(10)

No. 88-1835-CSY
Status: GRANTED

Title: Florida, Petitioner
v.
Martin Leslie Wells

Docketed:
April 27, 1989

Court: Supreme Court of Florida

Counsel for petitioner: Neimand,Michael J.

Counsel for respondent: Johnson,Huntley

Entry	Date	Note	Proceedings and Orders
1	Apr 27 1989	G	Petition for writ of certiorari filed.
2	May 26 1989		Brief of respondent Martin L. Wells in opposition filed.
3	May 30 1989		DISTRIBUTED. June 15, 1989
4	Jun 19 1989		Petition GRANTED.
			**********
6	Jul 26 1989		Order extending time to file brief of petitioner on the merits until August 12, 1989.
8	Aug 10 1989		Brief of petitioner Florida filed.
7	Aug 11 1989		Joint appendix filed.
9	Sep 6 1989		Record filed.
		*	Certified copy of original record received.
11	Sep 14 1989		Order extending time to file brief of respondent on the merits until September 29, 1989.
12	Sep 26 1989		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1989. (3RD CASE)
13	Sep 29 1989		Brief of respondent Martin L. Wells filed.
14	Oct 5 1989		CIRCULATED.
15	Dec 4 1989		ARGUED.

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88-1835

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

THE STATE OF FLORIDA,

Petitioner

vs.

MARTIN LESLIE WELLS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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April 28, 1989

QUESTION PRESENTED

WHERE A LAW ENFORCEMENT AGENCY MAINTAINS INSTRUCTIONS REQUIRING A COMPREHENSIVE AND DETAILED INVENTORY FOR ALL IMPOUNDED CARS, BUT CLOSED CONTAINERS ARE NOT SPECIFICALLY DEALT WITH, DOES THIS TYPE OF INSTRUCTION PERMIT AN IMPOUNDING OFFICER TO SEARCH AND INVENTORY CLOSED CONTAINERS?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at ___ So.2d ___, 14 F.L.W. 87, No. 69.363 (Fla. March 2, 1989). (Pet. App. 1a-36a). This opinion was entered on rehearing and the

original opinion was withdrawn and is not reported, except at 13 F.L.W. 686 (Fla. Dec. 1, 1988). (Pet. App. 37a-72a).

The opinion of the District Court of Appeal of Florida, Fifth District is reported at 492 So.2d 1375. (Pet. App. 73a-90a).

The trial court's order denying the motion of Respondent, Martin Leslie Wells to suppress evidence is not reported. (Pet. App. 91a-92a).

JURISDICTION

The Supreme Court of Florida's opinion on rehearing was filed on March 2, 1989. This Court has jurisdiction. 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...

Amendment XIV, Section 1, United States Constitution provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall

> be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent, Martin Leslie Wells ("Wells"), was the respondent in the Supreme Court of Florida. The facts of this case, as set forth in the decision below, are as follows:

> While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test. When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.
>
> Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. Id. at 1376.
>
> The car subsequently was transported to a facility under contract with the state, where a search was conducted. During the search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. Id.

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. Id. at 1375, 1378. From this order, the state now seeks review.

[1] A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

(Pet. App. 2a-4a).

The Supreme Court of Florida accepted the State's petition for discretionary review. That court approved in part and quashed in part

the decision of the district court.[1] The Supreme Court concluded that Well's consent to search was strictly limited to the trunk and the seizure of the marijuana cigarette butts from the passenger compartment and the marijuana from the suitcase was, on this ground, properly suppressed. The court also concluded that even though the vehicle was legally impounded, the permissible scope of the inventory search only extended to the interior of the car and not to the opening of the suitcase

[1] The Supreme Court of Florida's opinion on rehearing modified its original opinion only by finding that the seizure of the marijuana cigarette butts discovered during the inventory search of the passenger compartment was constitutional. The Court did not modify its holding that the scope of the inventory search did not extend to closed containers without a standardized policy on the subject.

found in the trunk. [2] Therefore, on this ground, the court quashed that part of the district court's decision that suppressed the marijuana cigarette butts and approved the part which suppressed the marijuana found in the suitcase. (Pet. App. 5a-23a).

With respect to the scope of the inventory search, the court found that Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), required the suppression of the marijuana found in the closed suitcase. According to the court, Bertine requires that there be specific

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[2] The court's opinion validated an inventory search of the interior of the vehicle, without differentiating between the passenger compartment and the trunk. The Court's rationale, however, accepts the validity of the inventory search of the trunk, but not of the closed containers found within the trunk.

policies regarding the scope of an inventory search. Such policies are required to limit the impermissible discretion a police officer has when it is his decision to open or not a closed container. The court, relying on part of Footnote 6 of Bertine, found the foregoing to be a clear holding of the Bertine Court. Footnote 6 states:

> We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

(Quoted in Pet. App. 17a-18a). (Florida Supreme Court emphasis).

In applying this interpretation, the court found that the Florida

Highway Patrol did not have a standard procedure that mandated the opening of all containers found during an inventory search. The failure to have such a policy placed impermissible discretion with the police, and therefore the opening of the suitcase violated Bertine. (Pet. App. 19a-21a).

The dissent found that the majority's interpretation of Bertine was overly restrictive and erroneous. (Pet. App. 26a-27a). The purpose of an inventory search is: to protect the owner's property; to protect the police against claims over lost and stolen property; and to protect the police from potential dangers. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). (Pet. App. 27a). The Florida Highway

Patrol's manual was designed to meet these purposes when it made the impounding officer liable for the vehicle, its parts and contents and instructed the impounding officer to inventory all articles in the vehicle. (Pet. App. 27a-29a). The dissent also concluded that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, the scope of the inventory encompasses the entire vehicle and its contents. (Pet. App. 29a-30a). The need for specific guidelines delineating the scope of the search is not required under Bertine as long as there is a standard policy that all impounded vehicles be inventoried and that the reasons for the policy is consistent with the three purposes of the inventory search set forth in

Opperman and reiterated in Bertine. (Pet. App. 30a-32a). Therefore, the dissent would have entirely quashed the district court's decision and would have reinstated the conviction. (Pet. App. 35a).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE INVENTORY SEARCH OF THE CLOSED SUITCASE EXCEEDED THE SCOPE OF THE STANDARD POLICE INSTRUCTIONS FOR INVENTORY SEARCHES CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL, OR DECISIONS OF APPELLATE COURTS OF THE OTHER STATES.

After Well's vehicle was lawfully impounded, an inventory search, pursuant to Florida Highway Patrol's standardized procedure, was conducted. According to the Florida Highway Patrol's written rules, the vehicle, its parts, and contents were to be searched and inventoried. (Pet. App. 93a). The Supreme Court of Florida, relying on Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739

(1987), upheld the inventory search of the interior of the car, but invalidated the inventory search of the closed suitcase because the Florida Highway Patrol did not maintain a specific standardized policy regarding the opening of closed containers located in the car during lawful inventory searches. The court concluded that without a specific policy covering the subject, impermissible discretion was given to the searching officer to determine in all situations, whether or not to open a closed container. The court specifically relied on Footnote 6 of Bertine, quoted in text supra, at 11.

This holding, based on a erroneous interpretation of Bertine, resulted in an overly restrictive misapplication of

the law to the facts herein. The proper interpretation of Bertine is that there must be a standardized policy to inventory all impounded vehicles and that the standardized policy must meet the purposes encompassing the inventory search exception to the warrant requirement. When the standardized policy is designed to accomplish the goals of an inventory search, then the scope of the search extends to all parts and contents of the vehicle which are necessary to achieve the purposes of the search.

This Court first recognized the inventory search exception to the warrant requirement in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), holding that

the contents of vehicles taken into police custody may be inventoried without a warrant, probable cause or reasonable suspicion. Opperman identified three justifications for the inventory exception: protection of the owner's property while it is in police custody; protection of the police against claims of lost or stolen property; and protection of the police from danger. Id., 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005. These justifications were reiterated in Bertine, supra, 479 U.S. at 372, 107 S.Ct. at 741, 93 L.Ed.2d at 745. These strong governmental interests are sufficient to justify a routine inventory of the contents of impounded vehicles.

In the present case, the Florida Highway Patrol Forms and Procedures Manual concerning inventory searches is designed to meet the strong governmental interests identified in Opperman. Chapter 16, Section 16.00.00, of the manual, states:

> **Purpose of Vehicle and Property Receipts**
>
> In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner becomes the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents. Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the

> Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(Pet. App. 93a). (Emphasis supplied). Section 16.01.00 provides that inventory forms are to be used <u>any</u> time a vehicle is impounded. (Emphasis supplied). (Pet. App. 94a). Section 16.02.00 requires that an officer, when completing the inventory and vehicle storage receipt, list an inventory of <u>all articles</u> on the vehicle and gives examples thereof. (Emphasis supplied). (Pet. App. 99a).

The foregoing instructions establish that an inventory search is required on all impounded vehicles and its scope extends to all articles located anywhere in the vehicle. These standard instructions are consistent with the purposes of the inventory search as set forth in <u>Opperman</u> and reiterated in <u>Bertine</u>, to wit: the protection of the owner's property and the protection of the police against claims of lost property and from danger of articles located within the vehicle.

The dissent in the court below, relied on the foregoing analysis. (Pet. App. 26a-30a). The dissent further realized that to require a specific policy regarding opening of closed containers would not adequately serve the purposes behind an inventory

search. (Pet. App. 30a). The reason why the purposes would not be served is self evident. Absent inspection of closed containers, not only can claims of lost property be made, but more importantly dangerous explosives, either intentionally or innocently assembled, could remain undiscovered until tragedy occurred.

The dissent then exposed the false premise underlying the majority's opinion:

> The majority's conclusion that here, unlike Bertine, the police operating instructions do not mandate the opening of closed containers is contrary to the facts of Bertine as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court

found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." Bertine, 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory form listing all articles, such as articles of clothing, equipment, and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. Bertine, 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific

> than those which the Bertine concurring opinion found "mandate[d] the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view, Bertine stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

(Pet. App. 30a-32a). Based on the foregoing, the Supreme Court of Florida's interpretation of Bertine is erroneous and thus is in direct conflict with precedent from this Court on this question.

The decision below also expressly conflicts with decisions of the United States Courts of Appeal on this issue. It also conflicts with decisions of appellate courts of other states.

In United States v. Frank, 864 F.2d 992 (3rd Cir. 1988), the court was faced with the same situation as the instant case. In Frank, the defendant, relying on Footnote 6 of Bertine, contended that a legally valid inventory search did not occur because there was no finding that the police were following preexisting standardized procedures. Specifically, defendant contended that the opening of a locked trunk, the removal of a zippered garment bag therefrom and the opening of the zipper to inventory the contents was not authorized since specific standardized procedure did not exist concerning the opening of closed containers. In support of this contention, defendant therein relied on the same dicta in Footnote 6 of Bertine that the Supreme Court of

Florida did in invalidating the inventory search in question.

The Third Circuit, engaged in the same analysis the dissent in the instant case did concerning the need for a specific policy for opening closed containers. After reviewing the pertinent decisions from this Court, that court concluded, as did the dissent herein, that this Court's prior opinions do not require a specific policy concerning closed containers. Id. at 1002-1003. The Court then found that the police regulations in question mandated that all impounded vehicles be inventoried but that there was no formalized scope for said inventory. The court, after identifying the governmental interests enunciated in Opperman, held:

> ... When, as here, a zippered hanging bag containing personal property is taken into police custody, no standard for the scope of the inventory other than the listing of every item of property would satisfy the relevant governmental interests. Black's Law Dictionary defines "inventory" as " a list or schedule of property, containing a designation or description of each specific article." Black's Law Dictionary 740 (5th Ed. 1979). Elsewhere the word is likewise defined as "a formal, often descriptive, list of articles, giving the code number, quantity and value of each; catalog." Random House Dictionary of the English Language (2d ed. 1983). Use of the term "inventory" of necessity defines it scope. Certainly the Court did not intend to lay down a constitutional requirement that the police have a written standard for conducting an inventory that merely states the obvious. Such a requirement would add nothing to the protection of privacy interest, for no standard ever would be laid down except that, of

completeness. Inventory searches by their nature afford the police the opportunity to eliminate expectations of privacy in personal property lawfully in police custody. It seems likely, therefore, that all that *Bertine* requires is a standard as to when inventories should be made. If more is required, Lieutenant Kowalski's testimony, that an inventory is required sufficient to safeguard the property, satisfied that requirement, since it necessarily implies a detailed account, catalog or schedule.

Id. at 1003-1004.

In United States v. Judge, 864 F.2d 1144 (5th Cir. 1989), Drug Enforcement Administration (DEA) agents, during a lawful inventory search, opened a closed backpack and found $65,000. The court concluded that the inventory search was conducted pursuant to a procedure sufficiently standardized to

satisfy the Fourth Amendment, even though the DEA leaves to its agents discretion to decide whether an object is a "container" and whether to take the container into custody. The court found that, under Bertine, law enforcement officers may open closed containers during an inventory search, only if the search is being carried out pursuant to a standard procedure that requires the opening of such containers in every case. Here, the court said, the virtually infinite number of objects that could be deemed containers makes the decision whether an object is a container inherently discretionary. Thus, the pertinent question is whether the search can objectively be viewed as motivated by administrative or safety motives rather than evidentiary concerns. Since a backpack is likely

to contain effects of value to the owner, a search of it can reasonably be viewed as meant to further the administrative purposes underlying the inventory search exception, to wit: the safe-guarding of property and the protection of police. A similar analysis was applied to DEA Agents' discretion in deciding whether to take a container into custody.

In United States v. Porter, 859 F.2d 83 (8th Cir. 1988), after Porter was arrested his car was searched and a locked briefcase was found in the trunk. The briefcase was forced open revealing a large quantity of drugs. The court, relying on Bertine, held the search constitutional as a valid inventory search. The standard police procedure relied upon was simply the

police officer's testimony that" the search was pursuant to local and federal police policies requiring the officers to inventory the contents of vehicles thoroughly." Id. at 83.

In State v. Muralt, 376 N.W.2d 25 (N.D. 1985) cert. denied, 479 U.S. 1063, 107 S.Ct. 947, 93 L.Ed.2d 997 (1987), the defendant was arrested for being in physical control of a motor vehicle while under the influence of alcohol. During an inventory search of the vehicle, a canvas bag was found on the back seat and when it was opened a sawed-off shotgun was discovered. The court concluded that routine police procedures was all that was necessary to validate the search as long as it was done in accordance with the Opperman justifications.

In State v. Shamblin, 763 P.2d 425 (Utah 1988) the defendant was arrested for driving under the influence and an inventory search uncovered a zippered shaving kit bag. The officer unzipped the bag and discovered marijuana. The court, after finding that procedures did not exist governing the opening of closed containers during inventory searches, suppressed the evidence. The court, relying on Footnote 6 of Bertine, concluded that a standardized policy regarding closed containers is required to insure that impermissible discretion would not be used by police.

As the foregoing decisions evidence, the majority of appellate courts that have reached the question, have held that as long as there is a

standardized policy requiring that all impounded cars be inventoried, then there is not a need for a specific standardized policy regarding closed containers. The reason therefore is that since an inventory search is conducted for administrative or safety needs then the search of all articles which fall within the parameters of those needs is constitutional regardless of where the article is located. To require otherwise would effectively negate the ability to effectuate the Opperman justifications. Besides the instant decision, only the Utah Supreme Court has applied the restrictive interpretation of Bertine, requiring a specific standardized policy for closed containers. Both courts relied on Footnote 6 of Bertine, while the other courts rejected the

contention that Footnote 6 controls. The present split in authority will only continue to widen without guidance from this Court, and therefore this case warrants consideration by this Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, **THE STATE OF FLORIDA**, respectfully requests that this Court grant its Petition for a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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APPENDIX

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STATE OF FLORIDA,
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v.

MARTIN LESLIE WELLS,
Respondent.

No. 69,363

Supreme Court of Florida

March 2, 1989

PER CURIAM.

On motion for rehearing by petitioner, we withdraw our prior opinion in this cause and substitute the following as the opinion of the Court.

We have for review Wells v. State, 492 So.2d 1375 (Fla. 5th DCA 1986), based on express and direct conflict with State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in

part the decision of the district court below.

While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.

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[1] A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. Id. at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in

an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. Id.

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. Id. at 1375, 1378. From this order, the state now seeks review.

The facts of this case raise three distinct questions of search and seizure law: the scope of the consent search conducted in this instance, the propriety of opening the locked container found during the automobile inventory search, and the propriety of the impoundment of respondent's vehicle.

The Consent Search

The state urges us to hold that respondent's general consent to open and look into the trunk of the automobile was sufficient to authorize the opening of any locked or closed containers found there. In support of this argument, the state contends that Wargin correctly extended the principles of United States v. Ross, 456 U.S. 798 (1982), to the consent-search context. We cannot agree.

Ross clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the Ross Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01. Based on these facts, Ross held: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Id. at 825 (emphasis added).

There was no issue of a consent search in Ross. Indeed, the principles

that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:

> The considerations upon which the holding in Ross is grounded do not exist in the consent search context where there is no probable cause. If a person consents to the search of a vehicle containing luggage and a search of the vehicle alone reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the

> luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. Id. On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but not in my trunk."

Thus, we decline to apply Ross to consent searches, and, to the extent it conflicts with our opinion today, we disapprove Wargin. We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

We also concur with the district court's conclusion that the consent given in this instance did not permit the police to pry open locked luggage with a knife. Respondent's permission merely indicated that the police could look into the automobile trunk. This was an insufficient basis for the police action that followed.

In so holding, we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.[2]

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[2] Ross itself reached this conclusion when it explicitly distinguished United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979). See United States v. Ross, 456 U.S. 798, 811-15 (1982). Chadwick had drawn a clear distinction between automobiles, which have a "diminished expectation of privacy," 433 U.S. at 12, and luggage which has "expectations of privacy ... substantially greater than

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in an automobile." Id. at 13. Sanders had suggested that a warrant was required to open a suitcase where "it was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U.S. at 767 (Burger, C.J., concurring in the judgment). Ross reaffirmed this holding, although it rejected some of Sanders' analysis. 456 U.S. at 824. If this conclusion applies when the police actually have probable cause to search luggage, it certainly applies when they do not.

As stated in Chadwick:

> Once the federal agents had seized it ... there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. ... With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

433 U.S. at 13. Moreover, Chadwick expressly noted that the search of the footlocker was a far greater intrusion into interests protected by the fourth amendment than was the mere seizure of the footlocker. Id. at 14 n.8.

When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis. Our own courts generally have agreed on this principle. State v. Carney, 423 So.2d 511 (Fla. 3d DCA 1982) (permission to go aboard boat did not give consent to open hidden compartments and containers therein); Loftis v. State, 391 So.2d 219 (Fla. 1st DCA 1980) (defendant's cooperation in opening truck did not give agricultural inspector consent to remove and open taped package), review denied, 399 So.2d 1146 (Fla. 1981);

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In the present case, the arresting officer plainly stated that he had no actual consent to open the suitcase found in the automobile trunk.[3] We

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[3] The following colloquy with the arresting officer occurred:

> Q: Did [Wells] give you pemission to go into the trunk of that car?
> A. Oh, yes, no problem, but he said -- I said: "Do you mind if I look in your trunk," and he said, "Sure, go right ahead."
>
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thus must agree with the court below that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside.[4]

> Q: Now, since [Wells] had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?"
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> A. No, I didn't.

[4] We acknowledge that this case raises an issue as to whether respondent had standing to assert a privacy interest in the luggage itself, since he apparently contended the luggage was not his. See United States v. Salvucci, 448 U.S. 83 (1980) (receding from the "automatic standing" doctrine). We find, however, that the state effectively has waived this argument by failing to raise it below, or in this appeal. See Steagald v. United States, 451 U.S. 204, 209 (1981). Moreover, respondent unquestionably does have a protected privacy interest in the borrowed car he was driving, which confers standing to challenge both the impoundment and

Wells, 492 So.2d at 1378. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside that container, Arkansas v. Sanders, 442 U.S. 753, 765-66 (1979), that is protected under the United States Constitution and Florida's privacy amendment from the kind of governmental intrusion without probable cause that occurred in this case. See Art. I, § 23, Fla. Const.

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inventory search conducted in this instance. See United States v. Posey, 663 F.2d 37 (7th Cir.), cert. denied, 455 U.S. 959 (1982); State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982), aff'd in pertinent part, 309 N.C. 224, 306 S.E.2d 446 (1983); People v. Robinson, 121 Misc.2d 267, 467 N.Y.S.2d 552 (Westchester County Ct. 1983); People v. Zimmerman, 117 Misc.2d 121, 458 N.Y.S.2d 468 (Sup. Ct. 1982).

As to the marijuana cigarette butts found in the ashtray, we conclude that their seizure is not sustainable under a consent theory, since the trooper neither asked for nor received permission to search the passenger compartment.

The Inventory Search

We must also reject the state's contention that the seizure of the luggage was independently permissible under an inventory search theory. In Colorado v. Bertine, 107 S.Ct. 738 (1987), the United States Supreme Court delineated the requirements for opening sealed containers during a proper inventory search. Bertine stated:

> We emphasize that, in this case, the trial court found that the police

> department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Id. at 742 n.6 (emphasis added; citations omitted). As Justice Blackmun noted in his special concurring opinion, joined by two other justices:[5]

> The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensured that

[5] These three justices also concurred in the majority opinion, and specifically cited footnote 6 as a reason for so doing. 107 S.Ct. at 744. As a ground upon which a majority of the Court agreed, the "no discretion" requirement constitutes a clear holding of the Bertine court.

> inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.

Id. at 744 (Blackmun, Powell & O'Connor, JJ., concurring) (emphasis added; citation omitted).

The impermissible discretion to open or not to open containers is evident in this case. Contrary to Bertine's holding, the Florida Highway Patrol ("Patrol"), at least upon this record, operates under no mandatory standardized policy regarding closed containers. Unlike in Bertine, this record is devoid of any trial-court finding "that the police department's standard procedures did mandate the

opening of closed containers and the listing of their contents." Id. Joining this action as amicus curiae, the Patrol itself has submitted copies of relevant portions of its Policy Manual, which fail to address the question. Chapter 16 of the Policy Manual, governing the receipt of property and vehicles, speaks in general terms and requires nothing more than an "[i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools." Policy Manual, at 16-4. There is no mention of opening closed containers.

In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, Bertine probitis us from countenancing the procedure followed in this instance.

The police under Bertine must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated Bertine.

The Impoundment Issue

Finally, we find that the impoundment in this instance, and hence the seach of the interior of the car that followed was proper under Bertine. This conclusion is compelled by the fact that, to the extent of any inconsistency, Bertine has superseded Miller v. State, 403 So.2d 1307 (Fla. 1981), and Sanders v. State, 403 So.2d 973 (Fla. 1981). Under the analysis in

Bertine, we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in Miller and Sanders. Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousands dollars in cash rather than leave it unprotected at the roadside.

For this reason, we conclude that the seizure of the marijuana cigarette butts in this instance was permissible as an incident of a proper impoundment. See Art. I, § 12, Fla. Const. Since the cigarette butts were not inside any closed or locked contianer, the suppression of the butts was improper under Bertine.

We, thus, approve in part and quash in part the result reached by the district court below, and remand for

proceedings consistent with this opinion. No renewed motion for rehearing will be entertained.

It is so ordered.

EHRLICH, C.J., and BARKETT, GRIMES and KOGAN, JJ., Concur

SHAW, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur

SHAW, J., dissenting.

Article I, section 12 of the Florida Constitution provides that rights granted therein involving searches and seizures will be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court. Thus, the issue of impoundment and inventory search is controlled by South Dakota v. Opperman, 428 U.S. 364 (1976), and its progeny. I agree with the majority that Colorado

v. Bertine, 479 U.S. 367 (1987), has overruled Miller v. State, 403 So.2d 1307 (Fla. 1981), and Sanders v. State, 403 So.2d 973 (Fla. 1981), that the police are not required to provide an alternative to impoundment, and that the marijuana cigarette butts found in the car's ashtray are admissible. For the reasons which follow, I do not agree that Bertine mandates exclusion of the eighteen pounds of marijuana found in the locked suitcase.

Wells was stopped for speeding on a rural road between Palatka and St. Augustine in the evening hours. He alighted from his car and produced an expired driver's license and a car title in another's name. After the officer detected alcohol on his breath, Wells failed a roadside sobriety test and was arrested for driving under the

influence. Wells asked, however, to retrieve a coat from the car. While doing so, the officer saw a large sum of cash lying on the floorboard in front of the driver's seat. Wells gave conflicting explanations of this money and it was impounded and inventoried. The arresting officer asked Wells to open the car trunk and Wells agreed, saying he did not know what was inside, but neither the officer nor Wells could open the trunk. Wells agreed that the trunk could be forcibly opened, if necessary, after towing. The car was left with a backup officer and later towed. The arresting officer transported Wells to the local police station for a breathalyzer test and proceeded to the storage area to inventory the car. The arresting officer found two marijuana cigarette

butts in the car's ashtray. The tow operator then opened the trunk where a locked suitcase was found. The suitcase was forced open and eighteen pounds of marijuana in a trash bag were seized.

The majority holds that the police acted properly in impounding the car. However, relying primarily on Bertine, the majority holds that the eighteen pounds of marijuana should be excluded because Florida Highway Patrol standardized procedures do not specifically mandate that locked containers found in impounded cars be opened and inventoried. Although the FHP can easily remedy this perceived deficiency in their operating instructions, I am persuaded that the current instructions effectively mandate the opening and inventorying of

such closed containers when a vehicle is impounded and that these instructions are indistinguishable from those in Bertine.

The inventorying of the contents of impounded cars is based on three distinct needs: to protect the owner's property; to protect the police against claims over lost or stolen property; and to protect the police from potential dangers, such as explosives. Opperman, 428 U.S. at 369. The Florida Highway Patrol, Forms and Procedures Manual, section 16.00.00, provides:

> In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of

the owner become the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents. Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(Emphasis supplied.) Chapter 16.01.00 of the manual provides that inventory forms will be used any time a vehicle is towed and/or stored. Chapter 16.02.00 instructs officers, inter alia: "Lost Property in Vehicle--Inventory of all articles in the vehicle should be shown such as

articles of clothing, equipment and tools." (Emphasis supplied.) The companion form contains columns labelled "Item," "Quantity," and "Description of Property Obtained."

In my view, these instructions make clear that an inventory is required for all impounded cars and that the inventory will be comprehensive and detailed, extending down to articles, not merely containers, closed or otherwise. This reading of the instructions is consistent with the testimony of the officer who conducted the arrest and inventory. According to this officer, he consulted with his backup officer and supervisor, and, as in the case of previous arrests, the inventory was performed according to procedures he was supposed to follow. This

understanding of the standard instructions by the persons to whom they are addressed is also consistent with the three purposes of the inventory set forth in Opperman and reiterated in Bertine, none of which would be adequately served if closed containers were not opened and inventoried when vehicles are impounded.

The majority's conclusion that here, unlike Bertine, the police operating instructions do not mandate the opening of closed containers is contrary to the facts of Bertine as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for

inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." Bertine, 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory form listing all articles, such as articles of clothing, equipment, and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's

criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. Bertine, 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific than those which the Bertine concurring opinion found "mandate[d] the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view, Bertine stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

The majority also distinguishes United States v. Ross, 456 U.S. 798

(1982), holding that Ross addresses probable cause searches only and is not relevant to consent searches. However, in cases cited by petitioner and not distinguished by the majority, federal courts have found Ross relevant to the scope of a consent search. United States v. Kapperman, 764 F.2d 786, 794 (11th Cir. 1985); United States v. White, 706 F.2d 806, 808 (7th Cir. 1983). Moreover, on the authority of Bertine, Ross is relevant to inventory searches.

> "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments,

> upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." United States v. Ross, supra, 456 U.S. at 821, 102 S.Ct. at 2170.

We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.'" See Lafayette, supra, 462 U.S. at 648, 103 S.Ct. at 2610 (quoting New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981)).

Bertine, 479 U.S. at 375. The broad application of these quoted words and the fact that the Bertine Court chose to affirm their application to a non-probable cause, inventory search

strongly suggests that the Supreme Court does not take the narrow view of Ross which the majority adopts here. While Ross would not be authority to exceed the specific scope of a restricted consent, as the majority points out, it would appear to be applicable to an unrestricted consent search, or an inventory search, such as here.

In summary, the majority has misapplied Bertine which, in my view, is factually and legally indistinguishable from the case at hand. I would quash the decision below and reinstate the conviction.

OVERTON and McDONALD, JJ., Concur

Application for Review of the Decision of the District Court of Appeal - District Conflict of Decisions

Fifth District - Case No. 85-1630

(Putman County)

Robert A. Butterworth, Attorney General; Joseph N. D'Achille, Jr. and Fleming Lee, Assistant Attorneys General, Daytona Beach, Florida; and Elizabeth Masters and Walter M. Meginniss, Assistant Attorneys General, Tallahassee, Florida,

for Petitioner

Sharon W. Ehrenreich of Moore & Ehrenreich, Gainesville, Florida,

for Respondent

Enoch J. Whitney, General Counsel and R.W. Evans, Assistant General Counsel, Tallahassee, Florida,

Amicus Curiae for Department of Highway Safety and Motor Vehicles

STATE OF FLORIDA,
Petitioner,

v.

MARTIN LESLIE WELLS,
Respondent.

No. 69,363

Supreme Court of Florida

December 1, 1988

BARKETT, J.

We have for review Wells v. State, 492 So.2d 1375 (Fla. 5th DCA 1986), based on express and direct conflict with State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in part the decision of the district court below.

While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.

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[1] A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. Id. at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in

an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. Id.

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. Id. at 1375, 1378. From this order, the state now seeks review.

The facts of this case raise three distinct questions of search and seizure law: the scope of the consent search conducted in this instance, the propriety of opening the locked container found during the automobile inventory search, and the propriety of the impoundment of respondent's vehicle.

The Consent Search

The state urges us to hold that respondent's general consent to open and look into the trunk of the automobile was sufficient to authorize the opening of any locked or closed containers found there. In support of this argument, the state contends that Wargin correctly extended the principles of United States v. Ross, 456 U.S. 798 (1982), to the consent-search context. We cannot agree.

Ross clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the Ross Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01. Based on these facts, Ross held: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Id. at 825 (emphasis added).

There was no issue of a consent search in Ross. Indeed, the principles

that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:

> The considerations upon which the holding in Ross is grounded do not exist in the consent search context where there is no probable cause. If a person consents to the search of a vehicle containing luggage and a search of the vehicle alone reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater

> intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. Id. On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but not in my trunk."

Thus, we decline to apply Ross to consent searches, and, to the extent it conflicts with our opinion today, we disapprove Wargin. We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

We also concur with the district court's conclusion that the consent given in this instance did not permit the police to pry open locked luggage with a knife. Respondent's permission merely indicated that the police could look into the automobile trunk. This was an insufficient basis for the police action that followed.

In so holding, we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.[2]

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[2] Ross itself reached this conclusion when it explicitly distinguished United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979). See United States v. Ross, 456 U.S. 798, 811-15 (1982). Chadwick had drawn a clear distinction between automobiles, which have a "diminished expectation of privacy," 433 U.S. at 12, and luggage which has "expectations of privacy ... substantially greater than

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in an automobile." Id. at 13. Sanders had suggested that a warrant was required to open a suitcase where "it was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U.S. at 767 (Burger, C.J., concurring in the judgment). Ross reaffirmed this holding, although it rejected some of Sanders' analysis. 456 U.S. at 824. If this conclusion applies when the police actually have probable cause to search luggage, it certainly applies when they do not.

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In the present case, the arresting officer plainly stated that he had no actual consent to open the suitcase found in the automobile trunk.[3] We

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thus must agree with the court below that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside.[4]

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> Q: Now, since [Wells] had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?"
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Wells, 492 So.2d at 1378. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside that container, Arkansas v. Sanders, 442 U.S. 753, 765-66 (1979), that is protected under the United States Constitution and Florida's privacy amendment from the kind of governmental intrusion without probable cause that occurred in this case. See Art. I, § 23, Fla. Const.

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inventory search conducted in this instance. See United States v. Posey, 663 F.2d 37 (7th Cir.), cert. denied, 455 U.S. 959 (1982); State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982), aff'd in pertinent part, 309 N.C. 224, 306 S.E.2d 446 (1983); People v. Robinson, 121 Misc.2d 267, 467 N.Y.S.2d 552 (Westchester County Ct. 1983); People v. Zimmerman, 117 Misc.2d 121, 458 N.Y.S.2d 468 (Sup. Ct. 1982).

As to the marijuana cigarette butts found in the ashtray, we conclude that their seizure is not sustainable under a consent theory, since the trooper neither asked for nor received permission to search the passenger compartment.

The Inventory Search

We must also reject the state's contention that the seizure of the luggage and marijuana cigarette butts was independently permissible under an inventory search theory. In Colorado v. Bertine, 107 S.Ct. 738 (1987), the United States Supreme Court delineated the requirements for opening sealed containers during a proper inventory search. Bertine stated:

> We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Id. at 742 n.6 (emphasis added; citations omitted). As Justice Blackmun noted in his special concurring opinion, joined by two other justices:[5]

> The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine

[5] These three justices also concurred in the majority opinion, and specifically cited footnote 6 as a reason for so doing. 107 S.Ct. at 744. As a ground upon which a majority of the Court agreed, the "no discretion" requirement constitutes a clear holding of the Bertine court.

> the scope of the inventory search. This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.

Id. at 744 (Blackmun, Powell & O'Connor, J.J., concurring) (emphasis added; citation omitted).

The impermissible discretion to open or not to open containers is evident in this case. Contrary to Bertine's holding, the Florida Highway Patrol ("Patrol"), at least upon this record, operates under no mandatory standardized policy regarding closed containers. Unlike in Bertine, this record is devoid of any trial-court

finding "that the police department's standard procedures did mandate the opening of closed containers and the listing of their contents." Id. Joining this action as amicus curiae, the Patrol itself has submitted copies of relevant portions of its Policy Manual, which fail to address the question. Chapter 16 of the Policy Manual, governing the receipt of property and vehicles, speaks in general terms and requires nothing more than an "[i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools." Policy Manual, at 16-4. There is no mention of opening closed containers.

In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, Bertine

prohibits us from countenancing the procedure followed in this instance. The police under Bertine must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated Bertine.

The Impoundment Issue

Finally, we find that the impoundment in this instance, and hence the search of the interior of the car that followed was proper under Bertine. This conclusion is compelled by the fact that, to the extent of any inconsistency, Bertine has superseded Miller v. State, 403 So.2d 1307 (Fla.

1981), and Sanders v. State, 403 So.2d 973 (Fla. 1981). Under the analysis in Bertine, we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in Miller and Sanders. Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousands dollars in cash rather than leave it unprotected at the roadside.

For this reason, we conclude that the seizure of the marijuana cigarette butts in this instance was permissible as an incident of a proper impoundment. See Art. I, § 12, Fla. Const. Since the cigarette butts were not inside any closed or locked container, the suppression of the butts was improper under Bertine.

We, thus, approve in part and quash in part the result reached by the district court below, and remand for proceedings consistent with this opinion. No renewed motion for rehearing will be entertained.

It is so ordered.

EHRLICH, C.J., and BARKETT, GRIMES and KOGAN, JJ., Concur

SHAW, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SHAW, J., dissenting.

Article I, section 12 of the Florida Constitution provides that rights granted therein involving searches and seizures will be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court. Thus, the issue of

impoundment and inventory search is controlled by South Dakota v. Opperman, 428 U.S. 364 (1976), and its progeny. I agree with the majority that Colorado v. Bertine, 479 U.S. 367 (1987), has overruled Miller v. State, 403 So.2d 1307 (Fla. 1981), and Sanders v. State, 403 So.2d 973 (Fla. 1981), that the police are not required to provide an alternative to impoundment, and that the marijuana cigarette butts found in the car's ashtray are admissible. For the reasons which follow, I do not agree that Bertine mandates exclusion of the eighteen pounds of marijuana found in the locked suitcase.

Wells was stopped for speeding on a rural road between Palatka and St. Augustine in the evening hours. He alighted from his car and produced an expired driver's license and a car

title in another's name. After the officer detected alcohol on his breath, Wells failed a roadside sobriety test and was arrested for driving under the influence. Wells asked, however, to retrieve a coat from the car. While doing so, the officer saw a large sum of cash lying on the floorboard in front of the driver's seat. Wells gave conflicting explanations of this money and it was impounded and inventoried. The arresting officer asked Wells to open the car trunk and Wells agreed, saying he did not know what was inside, but neither the officer nor Wells could open the trunk. Wells agreed that the trunk could be forcibly opened, if necessary, after towing. The car was left with a backup officer and later towed. The arresting officer transported Wells to the local police

station for a breathalyzer test and proceeded to the storage area to inventory the car. The arresting officer found two marijuana cigarette butts in the car's ashtray. The tow operator then opened the trunk where a locked suitcase was found. The suitcase was forced open and eighteen pounds of marijuana in a trash bag were seized.

The majority holds that the police acted properly in impounding the car. However, relying primarily on Bertine, the majority holds that the eighteen pounds of marijuana should be excluded because Florida Highway Patrol standardized procedures do not specifically mandate that locked containers found in impounded cars be opened and inventoried. Although the FHP can easily remedy this perceived

deficiency in their operating instructions, I am persuaded that the current instructions effectively mandate the opening and inventorying of such closed containers when a vehicle is impounded and that these instructions are indistinguishable from those in Bertine.

The inventorying of the contents of impounded cars is based on three distinct needs: to protect the owner's property; to protect the police against claims over lost or stolen property; and to protect the police from potential dangers, such as explosives. Opperman, 428 U.S. at 369. The Florida Highway Patrol, Forms and Procedures Manual, section 16.00.00, provides:

> In the course of duty on a day to day basis, it is necessary for the protection of the

> Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner become the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents. Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(Emphasis supplied.) Chapter 16.01.00 of the manual provides that inventory forms will be used any time a vehicle is towed and/or stored. Chapter

16.02.00 instructs officers, inter alia: "Lost Property in Vehicle--Inventory of all articles in the vehicle should be shown such as articles of clothing, equipment and tools." (Emphasis supplied.) The companion form contains columns labelled "Item," "Quantity," and "Description of Property Obtained."

In my view, these instructions make clear that an inventory is required for all impounded cars and that the inventory will be comprehensive and detailed, extending down to articles, not merely containers, closed or otherwise. This reading of the instructions is consistent with the testimony of the officer who conducted the arrest and inventory. According to this officer, he consulted with his backup officer

and supervisor, and, as in the case of previous arrests, the inventory was performed according to procedures he was supposed to follow. This understanding of the standard instructions by the persons to whom they are addressed is also consistent with the three purposes of the inventory set forth in Opperman and reiterated in Bertine, none of which would be adequately served if closed containers were not opened and inventoried when vehicles are impounded.

The majority's conclusion that here, unlike Bertine, the police operating instructions do not mandate the opening of closed containers is contrary to the facts of Bertine as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor

Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." Bertine, 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the FHP instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory form listing

all articles, such as articles of clothing, equipment, and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. Bertine, 479 U.S. at 376 n.7. The standard FHP instructions here are even more specific than those which the Bertine concurring opinion found "mandate[d] the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view, Bertine stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted,

contraband discovered is constitutionally admissible.

The majority also distinguishes United States v. Ross, 456 U.S. 798 (1982), holding that Ross addresses probable cause searches only and is not relevant to consent searches. However, in cases cited by petitioner and not distinguished by the majority, federal courts have found Ross relevant to the scope of a consent search. United States v. Kapperman, 764 F.2d 786, 794 (11th Cir. 1985); United States v. White, 706 F.2d 806, 808 (7th Cir. 1983). Moreover, on the authority of Bertine, Ross is relevant to inventory searches.

> "When a legitimate search is under way, and when its purpose and its limits have been

> precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." United States v. Ross, supra, 456 U.S. at 821, 102 S.Ct. at 2170.
>
> We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.'" See Lafayette, supra, 462 U.S. at 648, 103 S.Ct. at 2610 (quoting New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981)).

Bertine, 479 U.S. at 375. The broad application of these quoted words and the fact that the Bertine Court chose to affirm their application to a non-probable cause, inventory search strongly suggests that the Supreme Court does not take the narrow view of Ross which the majority adopts here. While Ross would not be authority to exceed the specific scope of a restricted consent, as the majority points out, it would appear to be applicable to an unrestricted consent search, or an inventory search, such as here.

In summary, the majority has misapplied Bertine which, in my view, is factually and legally indistinguishable from the case at hand. I would quash the decision below and reinstate the conviction.

OVERTON and McDONALD, JJ., Concur

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Fifth District - Case No. 85-1630
(Putnam County)

Robert A. Butterworth, Attorney General; and Joseph N. D'Achille, Jr., Daytona Beach, Florida, and Elizabeth Masters, Tallahassee, Florida, Assistant Attorneys General,

for Petitioner

Sharon W. Ehrenreich of the Law Firm of Huntley Johnson, Gainesville, Florida,

for Respondent

Enoch J. Whitney, General Counsel and R.W. Evans, Assistant General Counsel, Tallahassee, Florida,

Amicus Curiae for Department of Highway Safety and Motor Vehicles

MARTIN LESLIE WELLS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 85-1630

In the District Court of Appeal
of the State of Florida
Fifth District

August 21, 1986

Appeal from the Circuit Court for Putnam County;
E.L. Eastmoore and Robert R. Perry, Judges

Sharon W. Ehrenreich, of Law Firm of Huntley Johnson, Gainesville, for Appellant.

Jim Smith, Attorney General, Tallahassee, Florida, and Joseph N. D'Achille, Jr., Assistant Attorney General, Daytona Beach, Florida, for Appellee.

Orfinger, J.

The defendant appeals from a conviction for possession of a controlled substance and the term of probation imposed, having entered a plea of nolo contendere, specifically preserving his right to appeal the denial of his motion to suppress evidence. Because we conclude that the warrantless search was unreasonable and unlawful, we reserve.

The facts are not in dispute. On the evening of Monday, February 11, 1985, Trooper Rodney Adams of the Florida Highway Patrol stopped the appellant for speeding. The appellant exited his vehicle and produced his driver's license and explained to the officer that the car belonged to a friend. The officer ran a license and

tag check and verified the accuracy of the statement concerning the ownership of the car, and also determined that the appellant's driver's license had expired. During the course of conversation, Trooper Adams noticed the smell of alcohol upon the appellant's person. After appellant acknowledged that he had been drinking, field sobriety tests were administered to him and the appellant was then arrested for driving under the influence of alcohol. Appellant agreed to take a breathalizer test and Trooper Adams informed him that he would be transported to the machine located at the Florida Highway Patrol Station. The officer testified that the car was parked off the highway, and was not a hazard to traffic.

Before departing to the station, appellant asked Adams if he could retrieve his jacket, which was in the automobile. Adams returned to the car with appellant to be certain that appellant was not going after a weapon. When appellant opened the car door Trooper Adams, using his flashlight, saw what appeared to be a large sum of money lying on the floorboard on the driver's side.

The officer testified that while he wondered about the money, he had no reason to believe that there was any contraband in the car, but because he believed that he had to impound the car he asked for permission to look in its trunk. Appellant first attempted to open the trunk and when unable to do so, gave the key to Trooper Adams who was also unsuccessful. Appellant was

told that if the trunk could not be opened with the key, that it may have to be "popped" open. The appellant agreed to this and indicated that he did not know what was in the trunk. Appellant was taken to the Florida Highway Patrol station to take the breathalyzer test and the vehicle was towed to K & S Automotive at approximately 12:30 or 1:00 A.M. The officer never asked for and was never given permission to search the passenger compartment of the car.

Trooper Adams arrived at K & S Automotive at approximately 1:30 A.M. and proceeded to search the car with the assistance of Grover Bryon, an employee of K & S. A search of the interior of the car resulted in the discovery of two marijuana "roaches" in the ashtray. Bryon opened the locked

trunk with the key, explaining to the officer that the button had to be depressed as the key was turned. There was only a locked blue suitcase in the trunk. Adams instructed Bryon and another employee of K & S to pry open the locked suitcase. After about 10 minutes, the suitcase was pryed open and a dark colored plastic garbage bag was found inside the suitcase. Adams opened the garbage bag and found inside a quantity of marijuana.

Although the officer throughout his testimony characterized the search as an "inventory search," it is clear that the warrantless search cannot be sustained on that basis. The parked automobile was not a traffic hazard, there was no cause to believe that it contained contraband, and the officer concededly did not advise the defendant

of alternatives to impoundment which were available to him.[1] Miller v. State, 403 So.2d 1307 (Fla. 1981); State v. Marini, 488 So.2d 551 (Fla. 5th DCA 1986); Moore v. State, 417 So.2d 1131 (Fla. 5th DCA 1982). The evidence would not support the search on the basis of probable cause because on this point too, the officer conceded that he had none. Nor can the search be supported as one incident to the defendant's arrest, because it was not

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[1] The officer testified that the defendant was alert and cooperative. The defendant tested .08 percent on the breathalyzer, less than the .1 percent required by law for a legal presumption that the person is under the influence of alcoholic beverages to the extent that his normal faculties are imparied. § 316.1934, Fla. Stat. (1985). Thus it is clear that there was no impediment to a dialogue between the officer and the defendant about possible alternatives to impoundment of the vehicle. Nor do these facts suggest that the defendant lacked the capacity to understand those alternatives. See Sanders v. State, 403 So.2d 973 (Fla. 1981).

contemporaneous to the arrest. Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); State v. Marini, supra.

The State does not dispute these principles, but does contend, however, that the search was based on consent, a recognized exception to the warrant requirement. The real question thus presented is whether the appellant's consent to look in the trunk of the car included consent to open and search the locked suitcase found in the trunk. If the search of the suitcase (and the passenger compartment) was validly based on consent, the search is not invalidated by the fact that the officer mistakenly characterized it as an inventory search. Padron v. State, 449 So.2d 811 (Fla. 1984).

The State relies strongly on State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982) wherein the court extended the rule announced in Ross v. United States, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) to consent searches. In Ross, the Supreme Court held that if a police officer has probable cause to search an automobile, then he justified in searching every part of the vehicle and all containers found therein that may conceal the object of the search. Id. In Wargin, the Fourth DCA applied this rule to a consensual search and held that consent to search a suitcase automatically extended to a search of all containers therein.

The defendant in Wargin was stopped in an airport by narcotics agents. The defendant gave his consent

to a search of his suitcase. In the presence of the defendant, the police searched his suitcase and found a "strangely heavy" Kleenex box. The box was opened and a plastic bag containing cocaine was found therein. The court held that an additional request for consent to search the Kleenex box was unnecessary for once the defendant gave his consent to a search of the suitcase, he consented to the search of all containers therein. The court, without extensive analysis, explained its holding as an extension of the Ross rule to consensual searches.

The Third DCA has considered the same question and has held contrary to the Wargin decision. In State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985), the defendant, a suspect in the theft of airline tickets, was stopped

in his automobile for committing a traffic violation. The law enforcement officer asked the defendant if he could search his car, but did not inform the defendant of the nature of the investigation or the object of the search. The defendant agreed and unlocked the doors. The officer opened the door and picked up the defendant's locked briefcase and opened it, finding the airline tickets.

In appealing the trial court's suppression of the evidence, the State argued that Wargin compelled reversal in that the defendant's consent to a search of his automobile extended to a search of his briefcase. In a well-reasoned opinion, the court re-examined the decision in Ross and held that it did not apply to consensual searches. The court recognized that the

considerations upon which the holding in Ross was grounded to do exist in a consensual search:

> The foundation of the automobile exception is the existence of probable cause. Ross, 456 U.S. at 807-09, 102 S.Ct. at 2163-64; Caroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924). It is the presence of probable cause and the practical considerations which emanate from its presence in the automobile search context which form the basis of the decision in Ross. The court emphasized, first, the necessity of the existence of probable cause and, second, the consequences of not allowing a search of containters. Those consequences include the greater intrusion of seizure or detention of the vehicle, containers and/or persons involved until a probable cause determination can be made by a magistrate. Ross, 456 U.S. at 806-08, 102 S.Ct. at 2163-64. The court specifically indicated that it was not deciding the scope of warrantless searches of automobiles done without

probable cause. Id. at 809, n.11, 102 S.Ct. at 2164 n.11.

> The considerations upon which the holding in Ross is grounded do not exist in the consent search context where there is no probable cause. If a person consents to a search of a vehicle containing luggage and a search of the vehicle alone reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no delemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage. [Emphasis in original].

Fuksman, 463 So.2d at 1069-1070.

We agree with the analysis of Fuksman.[2] Ross clearly was bottomed in the existence of probable cause, as indicated by the concluding paragraph of that opinion:

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[2] Were it not for the broad holding in Wargin that a general consent to search includes consent to search closed containers found within the search area, we could agree with its result on the facts of that case. Because the defendant fit a drug courier profile, the officers approached him, identified themselves as narcotics agents and asked for permission to search the suitcase. Clearly they were searching for narcotics. Thus, from those facts, the court could conclude that the consent to search the suitcase included consent to search any container within the suitcase which might contain the announced object of the search. In the case sub judice nothing even resembling these facts is present. This case more closely resembles State v. Carney, 423 So.2d 511 (Fla. 3d DCA 1982), where the court held that permission to go aboard defendant's boat was not equivalent to consent to search hidden compartments and containers.

> We hold that the scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

102 S.Ct. at 2173.

State v. Cargal, 417 So.2d 811 (Fla. 5th DCA 1982), also relied on by the State, can be distinguished. In Cargal, the defendant gave the police permission to search his van. Upon entering the van, the officers detected a strong ordor of marijuana emanating form a duffel bag in the van. The texture of the bag was also grassy in nature. The court reversed the order suppressing the marijuana and an

automatic weapon found in the bag, citing Ross as well as other cases. It is obvious that once the officers were lawfully inside the van based on consent to enter, the odor of marijuana coupled with the grassy texture of the contents gave the officers probable cause to beleive that the bag contained contraband, and because it was contained within a motor vehicle, a warrantless search of the bag was authorized. The essential diffeence between Cargal and this case is that at no time prior to prying open the suitcase did the officer ever have probable cause to beleive that the automobile or any container therein held any contraband.

Consent searches operate on different rules than probable cause searches. The State agrees that a

consensual search may be restricted in terms of time or area, Leonard v. State, 431 So.2d 614 (Fla. 4th DCA 1983), and must be terminated upon withdrawl of consent. Goldberg v. State, 407 So.2d 352 (Fla. 4th DCA 1981). No such rules apply in probable cause searches. What is included within the scope of a consent to search is ordinarly to be determined by the totality of the circumstances. Martin v. State, 411 So.2d 169 (Fla. 1982); Fuksman, supra. We hold here that the totality of the circumstances demonstrate that appellant's permission "to look in the trunk" was that and nothing more, and did not extend to the locked luggage within the trunk, nor to the passenger compartment of the car. Without such consent, the search was

unlawful. See Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983).

REVERSED.

UPCHURCH, C.J., AND COBB, J., concur.

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY,
FLORIDA

CASE NO. 85-167-CF-J

STATE OF FLORIDA,

Plaintiff,

vs. ORDER

MARTIN LESLIE WELLS,

Defendant.

THIS CAUSE coming before this Court upon Defendant's Motion to Suppress Evidence and this Court having reviewed respective supportive case law, reviewed pertinent testimony, heard oral arguments and being otherwise fully advised, it is

ORDERED and ADJUDGED that the Defendant's Motion to Suppress Evidence is hereby denied.

DONE and ORDERED in Chambers at Palatka, Putnam County, Florida, this 9th day of August, 1985.

/s/ E. L. EASTMOORE
E. L. EASTMOORE

cc: Maureen D. Sullivan
Assistant State Attorney

Huntley Johnson
Attorney for Defendant

FLORIDA HIGHWAY PATROL
FORMS AND PROCEDURAL MANUAL

Chapter 16

RECEIPTS, PROPERTY AND VEHICLE

16.00.00 Purpose of Vehicle and Property Receipts

In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner become the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents. Therefore, for the protection of the officer and the

Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

16.01.00 Application

These forms will be used anytime a vehicle is towed and/or stored. It is to be used when property is impounded or stored for any reason. If the owner or possessor is not present, arrangements should be made to leave

the receipt in a conspicuous place on the vehicle. In most incidents Property Receipts should be given to the owner or in his/her absence, it should be given to the driver.

16.02.00 Instructions for Completing the Inventory and Vehicle Storage Receipt (HSMV 61801):

1. Date of Storage/Towing - Enter date vehicle is being towed or stored. Example: 08-30-84.

2. Time - Enter time. Strike through non-applicable A.M. or P.M.

3. FHP Case Number - Enter assigned number.

4. Name/Address of Owner -

Show home address of owner, (avoid P. O. Box numbers), city, state, zip code.

5. Year Vehicle -
   Enter year vehicle was manufactured.

6. Make of Vehicle -
   Example: Ford, Chevrolet. Avoid types such as Mustang, Impala.

7. Body Style -
   Two (2) door, Four (4) door.

8. V.I.N. -
   Enter Vehicle Identification number.

9. Color -
   Enter color, designations rather than manufacture's color classi-

fication. Use basic colors - black, blue. If the vehicle is two tone use a slash to indicate such. Example: white/blue.

10. Tag Number -
    Enter complete license number on vehicle.

11. State -
    Enter the state the tag is assigned to. Proper abbreviation of state permissible. Example: Florida (FL), Georgia (GA).

12. Location Vehicle Towed From
    Enter location of where vehicle is being released to wrecker driver. Show state road, county road or street address if applicable. In rural areas give approximate

distance from nearest town or commnity.

13. Name of Towing Service -
Enter name of wrecker service. If not a rotation call, list address and city of towing service.

14. Address of Where Vehicle is Stored -
Show street address of location where vehicle is to be stored.

15. Hold on Vehicle -
Check appropriate block to indicate whether there is a hold on vehicle.

16. Reason for Hold -
Indicate the reason vehicle is being held. Example: Pending

Homicide Investigation, Hit and Run Investigation, Etc. If there is not a hold on vehicle this area must be left blank.

17. Equipment on Vehicle -
Check appropriate box indicating equipment affixed to vehicle. Under Other Equipment list any equipment in the vehicle that has not been listed above.

18. List Property in Vehicle -
Inventory of all articles in the vehicle should be shown such as articles of clothing, equipment and tools.

19. Identify Marks or Damage -
Indicate any identifying marks or damage to vehicle that occurred

prior to vehicle being released to the wrecker driver.

20. Signature -
Of Trooper indicating hold on vehicle. Vehicles with hold order orders are the responsibility of the Trooper. Keep in mind, vehicles is most cases cannot be held more than (72) hours without approval of State Attorney's Office.

21. Signature - Tow Truck Driver -
Have the person taking possession of vehicle sign. At this time the vehicle becomes the responsibility of the tow truck driver.

22. Signature - Impounding Officer(s)
- This is to be signed by the

Impounding Officer and if possible, another Trooper's signature certifying that the inventory is correct to the best of their knowledge.

23. Badge Number -
Current badge number of impounding Trooper.

24. Badge Number -
Current badge number of witness.

25. Troop -
Impounding officer's assigned Troop.

26. District -
Enter District within the assigned Troop.

27. Copies:

White - Original copy to be filed at District Headquarters.

Yellow -To be given to the owner and/or driver.

Pink - Copy to go the wrecker driver taking possession of vehicle.

16.03.00 Instructions for Completing the Evidence and/or Property Receipt HSMV 61802

1. Other Department Case No: Other case number not assigned by the Department. Example: Warrant from another Department.

2. Date -
Date property received.

3. FHP Case No. -
Case number assigned by the Florida Highway Patrol.

4. The nature of the property recorded and/or reason it was stored - Place a check mark by the appropriate information. Property of deceased; stolen property; bulk; physical evidence; trial; found; laboratory evidence; Destroy (to be destroyed); safe keeping.

5. Address where property impounded.

6. Type case - (accident, stolen, etc.).

7. Discovered by -
(enter full name, address, phone).

8. Owner/Victim -
(enter full name, address, phone). Cross out which ever does not apply.

9. Subject/Suspect Name -
Incarcerated - (Yes or No).
Warrant - (Yes or No).
(Warrant number should be other Department Case Number).

10. Item, Quantity and Description of property obtained -
(This section itemized list of property).

11. This section is to verify the property taken is a complete list of property taken from the person.

12. Signature of officer receiving

evidence/property - Enter appropriate Troop letter, District, I.D. number and badge number.

13. If necessary for proper handling, contact the State Attorney's Office and record the State Attorney, Assistant or otherwise name, address and phone for further referral.

14. When evidence is placed in the evidence locker, the officer in charge will sign the receipt and enter the reason stored, date and time. The Trooper should keep a copy of the receipt of the property. When it is necessary to take property out, the receipt will be returned and an entry made in this section as to who, why and

when the property is being removed. In cases for court, keeping record of the chain of custody as well as record on removal and return must be maintained at all times. The final disposition may be a court order to destroy the property or to return the property to the original possessor.

Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1835

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED (Restated)

WHERE A LAW ENFORCEMENT AGENCY MAINTAINS PROCEDURES TO INVENTORY THE CONTENTS OF IMPOUNDED VEHICLES WHICH DO NOT MANDATE OPENING CLOSED CONTAINERS, IS AN INVENTORY SEARCH OF SUCH A CLOSED CONTAINER CONSISTENT WITH THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES.

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No. 88-1835

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CONSTITUTIONAL PROVISIONS

Amendment IV, United States Constitution, provides, in part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, Section 1, United States Constitution provides, in part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Respondent adopts the facts of the case as stated by the court below.

> While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.
>
> Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.
>
> The car subsequently was transported to a facility under contract with the state, where a search was conducted. During the search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*
>
> Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review.

[1] A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

REASON FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL, AND DECISIONS OF APPELLATE COURTS OF OTHER STATES.

This Court first recognized vehicle inventory searches as a valid exception to the warrant requirement in *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). *Opperman* permits law enforcement agencies to inventory the contents of impounded vehicles if conducted according to standard police procedures. The Court articulated three situations where government interests outweighed an individual's Fourth Amendment rights: protecting the owner's property in police custody, protecting the police against claims of lost or stolen property, and protecting the police from danger. *Id.* 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005.

In *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), this Court re-emphasized that inventory searches are consistent with the Fourth Amendment.

Id. 479 U.S. at 372, 107 S.Ct. at 741, 93 L.Ed.2d at 745. The Court held that evidence obtained during inventory searches conducted according to standard police procedures is admissible. *Id.* 479 U.S. at 374, 107 S.Ct. at 742, 93 L.Ed.2d at 747. The Colorado trial court determined that the police department's procedures mandated opening closed containers and listing their contents. *Id.* 479 U.S. at 374 n.6, 107 S.Ct. at 742 n.6, 93 L.Ed.2d at 747 n.6. Since the police discovered the evidence during an inventory search conducted pursuant to standard police procedures, this Court concluded Fourth Amendment standards were satisfied.

The Supreme Court of Florida, citing *Bertine*, correctly invalidated the inventory search of the closed suitcase since the Florida Highway Patrol's standard procedures for inventory searches do not require such action. The court noted that the lack of such a procedure vested the searching officer with impermissible discretion to determine whether or not to open the container. The court emphasized that the record of the instant case revealed no standard procedure regarding closed containers. Thus, the searching officer improperly exercised his discretion by requiring the suitcase be pryed open and violated respondent's Fourth Amendment rights against unreasonable searches.

Petitioner inaccurately interprets *Bertine* to permit an inventory search of unlimited scope provided police procedures are consistent with the government interests espoused in *Opperman*. Petitioner's brief at 17. *Bertine* requires that a standard procedure exists to deal with closed containers and then, only if the procedure is followed is the evidence admissible. *Bertine*, 479 U.S. at 374,

107 S.Ct. at 742, 93 L.Ed.2d at 747. Petitioner's approach would permit searches in such a way as to obviate the warrant requirement. Law enforcement agencies could, after a lawful arrest, impound a vehicle and conduct a search under the guise of inventory procedures in a fashion for which the Fourth Amendment requires a warrant.

Petitioner correctly asserts that the Florida Highway Patrol's standard procedures for inventory searches are consistent with the government interests noted in *Opperman*. Petitioner's brief at 19. However, petitioner, citing the dissent in the court below, insists that only if inventory searches include opening closed containers are the *Opperman* justifications satisfied. Petitioner's brief at 21-22. Petitioner argues that without opening closed containers, law enforcement agencies are subject to claims for lost property and face the unknown dangers of concealed explosives. Petitioner's brief at 22.

These arguments fail the test of reason. Provided closed containers are in police custody until they are returned to the owner, the contents receive maximum protection. The *Opperman* justifications focus on protecting property by securing it in police custody. Law enforcement agencies may leave inventoried articles inside impounded vehicles which are stored in a secured facility. Alternatively, if impounded vehicles are kept in an unsecured area, the *Opperman* justifications warrant removing the property from the vehicle. In either case, the goal is to securely store the property.

Arguably, the likelihood of spurious claims of lost property will be greater if police open closed containers. Especially in the case of locked containers, destroying the

ability to secure personal property by prying open the containers will raise suspicion among property owners. Heightened expectations of privacy motivate the use of such containers. Once the police secure storage for articles discovered during an inventory search, the *Opperman* interests are satisfied. The *Opperman* rationale does not countenance discretionary searches driven by investigatory motives. Further, an undifferentiated fear of explosives is insufficient to justify opening closed containers. If police suspicions are strong enough, procedures authorized by warrant should be undertaken to preserve the individual's Fourth Amendment rights.

The heart of Petitioners' argument focuses on the dissent in the court below. The dissent emphasizes Justice Marshall's dissent in *Bertine:*

> The majority's conclusion that here, unlike *Bertine,* the police operating instructions do not mandate the opening of closed containers is contrary to the facts of *Bertine* as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." *Bertine,* 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory from listing all articles, such as articles of clothing, equipment,

> and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. *Bertine,* 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific than those which the *Bertine* concurring opinion found "mandate(d) the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view, *Bertine* stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

In the last sentence, the dissent accurately states the holding in *Bertine.* The dissent erroneously states that this Court held in *Bertine* that the police procedure mandated opening closed containers. The dissent continues by comparing the police procedure in *Bertine* the Florida Highway Patrol's inventory procedure. The opinion asserts that since Florida Highway Patrol's procedures are more specific than those in *Bertine,* and this Court held those to mandate opening closed containers, then the Florida Highway Patrol's procedures must mandate the same approach.

In *Bertine,* this Court never analyzed what the police procedures required. The Court merely emphasized that the Colorado District Court, after reviewing the standard procedures and all other evidence concluded that searching closed containers was mandatory. *Bertine,* 479 U.S. at 374 n.6, 107 S.Ct. at 742 n.6, 93 L.Ed.2d at 747 n.6. The trial court's determination is necessary to conclude that admitting the evidence obtained in *Bertine* is consistent with the Fourth Amendment, but this Court deferred to

the holding of the Colorado District Court. The language of the police procedures may be very similar, but local policies regarding implementation control from state to state. A federal form of government requires this result. Just as similar statutes among the several states may be construed differently, so may be standard police procedures.

The Supreme Court of Florida's holding in the instant case is entirely consistent with the holding in *Bertine*. Since the inventory search exceeded the scope of the Florida Highway Patrol's standard procedure, evidence obtained thereby was inadmissible. The fact that the Colorado police department in *Bertine* and the Florida Highway Patrol have similarly phrased procedures, but different interpretations of inventory search requirements is of no import. These differences result from varying implementations which, under *Bertine*, lead to the opposite conclusion.

Petitioner cites three courts of appeal decisions and two state appellate court decisions asserting the results are inconsistent with *Bertine*. In fact, the decisions reflect the *Bertine* holding accurately, and the seemingly inconsistent results occur due to differing determinations as to what standard police procedures require for inventory searches. Trial courts are particularly well suited to make such determinations. Interrogation of witnesses concerning standard procedures ensures the most accurate assessment of what is truly routine procedure. The language in procedure manuals may not be conclusive, yet agency policy mandates opening closed containers.

Petitioner's argument, logically extended presses for uniform police procedures for inventory searches nationwide. Inherent in constitutional principles is the limited power of the federal government and right of the states to experiment in matters of local concern. Issues of police power and thus inventory search procedures are included in this realm. The key to inventory searches consistent with the Fourth Amendment under *Opperman* and *Bertine* is that searching officers act without discretion. Parties conducting such searches must act within clearly defined bounds and then whatever evidence of criminal conduct is found is admissible.

CONCLUSION

For the reasons stated, this Court should deny to issue a Writ of Certiorari to review the judgment of the court below.

Respectfully Submitted,

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Supreme Court, U.S.
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NO. 88-1835

In The

Supreme Court Of The United States

October Term, 1988

STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED April 27, 1989
CERTIORARI GRANTED June 19, 1989

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IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 85-167-CF-J

STATE OF FLORIDA,

Plaintiff,

vs.

MARTIN LESLIE WELLS,

Defendant.

AMENDED MOTION TO SUPPRESS

COMES NOW the Defendant, MARTIN LESLIE WELLS, by and through his undersigned attorney pursuant to Florida Rules of Criminal Procedure 3.190 and moves this Court to suppress all evidence seized on February 12, 1985. As grounds, therefore, the Defendant would show unto the Court as follows:

1. That on the evening of February 11, 1985 before 10:00 PM MARTIN LESLIE WELLS was stopped by Trooper RODNEY ADAMS for excessive speeding in a BMW Tag No. YVY660.

2. That Trooper ADAMS radar had clocked MARTIN LESLIE WELLS driving sixty (60) miles per hour in a fifty (50) miles per hour zone.

3. That Trooper ADAMS observed no unusual movements of said vehicle; just excessive speed shown on the radar.

4. That at the time of the initial traffic stop MARTIN LESLIE WELLS promptly parked said vehicle appropriately off the shoulder of the highway.

5. That MARTIN LESLIE WELLS got out of his vehicle and approached Trooper ADAMS halfway and inquired as to the reason for the stop.

6. That MARTIN LESLIE WELLS promptly produced a driver's license and informed Trooper ADAMS he thought his license had been suspended or revoked.

7. That a subsequent license check revealed that MARTIN LESLIE WELLS driver's license had not been revoked or suspended.

8. That Trooper ADAMS requested a vehicle registration from MARTIN LESLIE WELLS.

9. That MARTIN LESLIE WELLS was unable to locate the vehicle registration, but produced a title for said vehicle showing the owner to be JOE TURNER.

10. That MARTIN LESLIE WELLS explained that his friend, JOE TURNER, had gone on a trip and had left the vehicle with him for his own exclusive use and possession.

11. That MARTIN LESLIE WELLS also explained JOE TURNER wanted the car sold and he (Mr. WELLS) was in the process of selling or attempting to sell JOE TURNER'S vehicle.

12. That according to Trooper ADAMS, it appeared that MARTIN LESLIE WELLS had been in possession of the vehicle for anywhere from a couple of days to a few weeks.

13. That MARTIN LESLIE WELLS also informed Trooper ADAMS he was moving and had been using the vehicle to transport his personal possessions from Hawthrone to St. Augustine.

14. That a subsequent license tag check revealed the car registered in the name of JOE TURNER, the same name as that appearing on the title.

15. That the information MARTIN LESLIE WELLS had given to Trooper ADAMS concerning ownership of the vehicle was correct.

16. That during the course of the conversation about MARTIN LESLIE WELLS driver's license and the ownership of the vehicle, Trooper ADAMS noticed the order of alcohol.

17. That MARTIN LESLIE WELLS responded yes to Trooper ADAMS inquiries as to whether or not he had been drinking.

18. That after MARTIN LESLIE WELLS responded yes, Trooper ADAMS administered the field sobriety tests.

19. That according to Trooper ADAMS, MARTIN LESLIE WELLS did not perform as well as he should have.

20. That according to the Alcohol Influence Report MARTIN LESLIE WELLS was cooperative and friendly.

21. That according to the Alcohol Influence Report, MARTIN LESLIE WELLS had a good ability to understand instructions.

22. That according to Trooper ADAMS, he would have given MARTIN LESLIE WELLS the benefit of the doubt and would have checked fit on the Alcohol Influence Report as to MARTIN LESLIE WELLS ability to drive.

23. That the basis for that decision was the observation of MARTIN LESLIE WELLS handling of the vehicle prior to the stop for speeding.

24. That during the stop and subsequent roadside tests MARTIN LESLIE WELLS conducted himself as a total gentleman.

25. That Trooper ADAMS then informed MARTIN LESLIE WELLS he was under arrest for DWI and would be transported to a breathalizer machine.

26. That MARTIN LESLIE WELLS Miranda Rights were not read to him at the time he was placed under arrest.

27. That MARTIN LESLIE WELLS requested permission to retrieve his jacket from his vehicle because it was cold outside.

28. That permission was granted and Trooper ADAMS accompanied MARTIN LESLIE WELLS to his vehicle.

29. That Trooper ADAMS did not detect the odor of burned marijuana coming from the inside of the vehicle.

30. That Trooper ADAMS did not detect the order of marijuana coming from any portion of the automobile.

31. That after approaching the vehicle, Trooper ADAMS observed what appeared to be a large amount of money lying in plain view on the floor of the driver's side of the vehicle.

32. That Trooper ADAMS questioned MARTIN LESLIE WELLS as to why the money was laying on the floor.

33. That Trooper ADAMS felt MARTIN LESLIE WELLS answers as to his inquiry about the money were contradictory and significant.

34. That Trooper ADAMS then checked with the Corporal on duty as to whether or not the vehicle should be inventoried.

35. That Trooper ADAMS was told to go ahead if he thought the guy was DUI, take the guy in for DUI, have the car impounded.

36. That during the course of that conversation the Corporal also advised Trooper ADAMS that "Anybody can have three thousand dollars on the floor of their car."

37. That Trooper ADAMS then took it upon himself to go ahead and have the car towed.

38. That MARTIN LESLIE WELLS, at the time of the initial traffic stop, had parked the car appropriately off the shoulder of the highway.

39. That the parked vehicle was not a traffic nuisance or a traffic hazard.

40. That Trooper ADAMS did not advise MARTIN LESLIE WELLS that his vehicle would be impounded unless he could provide a reasonable alternative to impoundment.

41. That although available and coherent MARTIN LESLIE WELLS was not consulted concerning the possibility of or alternatives to impoundment.

42. That Trooper ADAMS asked MARTIN LESLIE WELLS if he could look in the trunk of the car.

43. That MARTIN LESLIE WELLS gave Trooper ADAMS permission to look into the trunk.

44. That MARTIN LESLIE WELLS put the key into the trunk lock and attempted to open the trunk.

45. That after MARTIN LESLIE WELLS was unsuccessful in his attempt, he gave the keys to Trooper ADAMS who was also unsuccessful in opening the trunk.

46. That Trooper ADAMS informed MARTIN LESLIE WELLS they were going to gain access to the trunk of the car even if the trunk had to be popped.

47. That Trooper ADAMS did not ask MARTIN LESLIE WELLS whether he could look into anything subsequently found in the trunk of the vehicle.

48. That MARTIN LESLIE WELLS did not give permission to look into whatever was found in the trunk of the vehicle.

49. That Trooper ADAMS transported MARTIN LESLIE WELLS to the station while Trooper LARRY MCKENZIE se-

cured the vehicle until K & S Automotive arrived pursuant to Trooper ADAMS request.

50. That GROVER BRYAN picked the vehicle up and returned to K & S Automotive at approximately 12:30 or 1:00 A.M.

51. That GROVER BRYAN left the vehicle hanging on the wrecker and went in and went to bed.

52. That according to GROVER CLINTON BRYAN the vehicle was secured to the point that no one could have gotten into the trunk while it was in the compound at K & S Automotive.

53.That at approximately 1:30 A.M. GROVER CLINTON BRYAN was awakened and told that Trooper ADAMS wanted to inventory the vehicle.

54. That according to GROVER CLINTON BRYAN, Trooper ADAMS told him he wanted to inventory the car good, he wanted to go through it real good because he felt there were drugs in it.

55. That this conversation between GROVER CLINTON BRYAN and Trooper ADAMS concerning locating drugs within the vehicle occurred shortly after Trooper ADAMS arrival at K & S Automotive and prior to either gaining access to the vehicle for the purpose of an inventory.

56. That the vehicle did not smell of marijuana.

57. That according to GROVER CLINTON BRYAN, he and Trooper ADAMS went through the passenger compartment and found nothing but two little stub roaches of marijuana in the ashtray.

58. That according to GROVER CLINTON BRYAN, Trooper ADAMS kept saying there was more somewhere.

59. That according to GROVER CLINTON BRYAN, Trooper ADAMS asked if GROVER CLINTON BRYAN could open the trunk of the vehicle for the Trooper.

60. That according to GROVER CLINTON BRYAN, Trooper ADAMS said that three thousand dollars ($3,000) in cash had been found in the floorboard.

61. That according to GROVER CLINTON BRYAN Trooper ADAMS felt that the money that was found was from a drug deal.

62. That according to GROVER CLINTON BRYAN Trooper ADAMS said, "There aint nobody runs around with that kind of money in the floorboard unless they're dealing drugs or something like that."

63. That the locked trunk was then opened either by GROVER CLINTON BRYAN or Trooper ADAMS.

64. That inside the trunk was a big blue suitcase, locked, with a combination lock.

65. That Trooper ADAMS requested assistance in prying open the locked suitcase after the suitcase could not be opened due to the combination lock.

66. That according to GROVER CLINTON BRYAN, Trooper ADAMS said that the suitcase had to be opened because he had a strong suspicion that there were drugs in that car and it was probably in that suitcase.

67. That according to GROVER CLINTON BRYAN, Trooper ADAMS said he wanted to see into that suitcase to see if there were drugs in it.

68. That according to GROVER CLINTON BRYAN, Trooper ADAMS persisted that they needed to open the suitcase and find out what was in it.

69. That according to Trooper ADAMS, he felt that opening the suitcase would come under the inventory search of the vehicle and he would take his chances.

70. That a search warrant for the locked suitcase was never applied for.

71. That according to Trooper ADAMS, he thought a search warrant would be appropriate, but based on, "What we had and it was part of the search – I figured it was part of the search, I didn't see where it need be."

72. That according to Trooper ADAMS, "I felt like opening the suitcase would come under the inventory search of the vehicle."

73. That under instructions from Trooper ADAMS, WILLIAM KENNEDY and GROVER CLINTON BRYAN used their knives and pried around the sides of the suitcase until it popped open.

74. That the forced opening of the locked suitcase took approximately ten minutes.

75. That the suitcase opened to reveal a black/green plastic garbage bag.

76. That according to GROVER CLINTON BRYAN, Trooper ADAMS said, "There it is."

77. That Trooper ADAMS tore open the black/green plastic garbage bag and then tore through a second plastic bag which was inside the black/green plastic garbage bag which contained marijuana.

WHEREFORE, the initial warrantless impoundment and inventory search of the BMW Tag No. YVY660 was illegal as it was not reasonable and necessary under the circumstances and said search was used as a pretext for an investigative/exploratory search for drugs; therefore, any

evidence found as a result of the inventory search of February 12, 1985 should be suppressed and fails to provide probable cause for the further warrantless search of the locked suitcase found within the locked trunk of the BMW Tag No. YVY660.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MAUREEN SULLIVAN, Assistant State Attorney, Putnam County Courthouse, Palatka, Florida this 2 day of August, 1985.

LAW OFFICES OF HUNTLEY JOHNSON
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Gainesville, Florida 32602
(904) 372-6947
/s/ SHARON EHRENREICH for
HUNTLEY JOHNSON

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 85-168-CF-J

STATE OF FLORIDA,

Plaintiff,

vs.

MARTIN LESLIE WELLS,

Defendant.

ISSUES

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS ISSUES

IA.
WHETHER THE WARRANTLESS IMPOUNDMENT AND INVENTORY SEARCH OF THE BMW TAG NO. YVY660 CAN BE JUSTIFIED AS LAWFUL, REASONABLE AND NECESSARY, THEREBY GIVING RISE TO AN EXCEPTION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IB.
WHETHER ABSENT EXIGENT CIRCUMSTANCES, EVIDENCE FOUND AS A RESULT OF A PRETEXTUAL INVENTORY SEARCH CAN PROVIDE THE PROBABLE CAUSE BASIS NECESSARY TO VALIDATE THE WARRANTLESS SEARCH OF THE LOCKED SUITCASE FOUND WITHIN THE LOCKED TRUNK.

IC.
WHETHER ABSENT EXIGENT CIRCUMSTANCES AND PROBABLE CAUSE TROOPER ADAMS WAS CONSTITUTIONALLY OBLIGATED TO OBTAIN A SEARCH WARRANT BEFORE HE PRIED OPEN THE LOCKED SUITCASE FOUND WITHIN THE LOCKED TRUNK DURING THE PRETEXTUAL INVENTORY SEARCH.

STATEMENT OF THE FACTS

On the evening of Monday, February 11, 1985 Trooper Rodney Adams clocked Martin Leslie Wells driving sixty-one (61) miles per hour in a fifty (50) miles per hour zone. At the time of the initial routine traffic stop no unusual movements of the vehicle were observed and Martin Leslie Wells promptly pulled the car to the side of the road and parked appropriately off the shoulder of the highway.

Martin Leslie Wells promptly produced his driver's license explaining that he thought his license might be suspended or revoked. A check revealed that all was in order with Martin Leslie Wells' license and his license was valid.

Further conversation between Martin Leslie Wells & Trooper Adams revealed that the stopped vehicle, BMW Tag No. YVY660, belonged to Joe Turner, a friend of Martin Leslie Wells, who had left the vehicle in Martin Leslie Wells' possession so that it could be sold. Martin Leslie Wells was unable to locate the vehicle registration, but did produce the title bearing Joe Turner's name. Trooper Adams verified the information given to him.

During the course of this conversation Trooper Adams noticed the smell of alcohol. After Martin Leslie Wells acknowledged that he had been drinking, field sobriety tests were administered and Martin Leslie Wells was arrested for

DWI. During the stop, roadside tests and subsequent arrest Martin Leslie Wells conducted himself as a total gentleman.

Trooper Adams accompanied Martin Leslie Wells to the vehicle and observed a large amount of money on the floor. After consultation with other law enforcement officials wherein he was told, "Anybody can have three thousand dollars ($3,000) on the floor of their car", Trooper Adams, on his own initiative, made arrangements for impoundment.

Although the Alcohol Influence Report showed that Martin Leslie Wells had a "good" ability to understand instructions, and although Trooper Adams had been engaging Martin Leslie Wells in conversation(s) since the stop, Martin Leslie Wells was not advised or consulted as to the impoundment. Options to the impoundment were not mentioned nor discussed with Martin Leslie Wells.

Martin Leslie Wells was transported to the station where he blew a .08 and the vehicle was taken to K & S Automotive. Trooper Adams arrived at approximately 1:30 A.M. and before the start of the inventory search said he wanted to go through the car real good because he felt there were drugs in it.

Two stub roaches of marijuana were found in the ashtray of the vehicle. Trooper Adams insisted there was more somewhere, that the money found was from a drug deal, "There aint nobody runs around with that kind of money unless they've dealing drugs or something like that."

The locked trunk was opened revealing only a locked blue suitcase. After insisting that there were drugs in the suitcase Trooper Adams instructed Grover Bryan and William Kennedy to pry open the locked suitcase. After ten (10) minutes, the lid to the suitcase popped open. A green/black plastic garbage bag was found inside the suitcase. Marijuana was found inside the garbage bag.

The most basic constitutional rule provides that:

> "Searches outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. The exceptions are jealously and carefully drawn and there must be a showing by those who seek exemption...that the exigencies of the situation make the course imperative. The burden is on those seeking the exemption to show the need for it." *Coolidge v. New Hampshire,* 91 S.Ct. at 2032 (1971).

In addition to the Fourth Amendment to the United States Constitution, section 12 of Article I of the Florida Constitution prohibits unreasonable searches and requires warrants issued by a detached magistrate upon a showing of probable cause.

The State, in an effort to justify the warrantless intrusion and search of Martin Leslie Wells' vehicle, BMW Tag No. YVY660, has relied upon the practice characterized by police as an automobile inventory search, which necessitates at the onset of such a search, a lawful impoundment of the vehicle in question.

Although inventory procedures have been substantiated as a reasonable police intrusion under certain delineated circumstances, the Supreme Court in *South Dakota v. Opperman,* 96 S.Ct. 3092 (1976) expressly identified the automobile inventory procedure as a caretaking, non criminal one developed in response to three distinct needs: (1) The protection of the owner's property while it remains in police custody; (2) The protection of the police against claims or disputes over lost or stolen property; (3) and the protection of the police from potential danger.

Lawful impoundment is the touchstone of a valid inventory search and the impoundment in *Opperman* was held to be necessary and proper since the unoccupied vehicle had been illegally parked in a restricted zone for approximately seven hours, from 3 A.M. to 10 A.M., and had received two tickets. The Court characterized the inventory procedure in this manner:

> The police were indisputably engaged in a caretaking search of a lawfully impounded automobile...the inventory was conducted onlvy [sic] after the card [sic] had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. As in *Cady* there is no suggestion that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." *Opperman* at p. 3100.

The Court, with emphasis on the unoccupied nature of the vehicle, concluded that the conduct of the police in this instance was not unreasonable under the Fourth Amendment.

The Florida Supreme Court in *Miller v. State,* 403 So.2d 1307 (Fla. 1982) approved the doctrine of an inventory search as authorized by the United States Supreme Court in *Opperman,* reiterating the purpose of said search and holding:

> "(2) Any suggestion that standard police procedure for an inventory search is actually a pretext

> for investigative search will require search to meet traditional probable cause standards or be invalidated; (3) There must be a threshold inquiry by the trial court to determine that impoundment was for a lawful purpose and was reasonable and necessary under circumstances; and (4) When owner or possessor of the vehicle is present, arresting officer must advise him that motor vehicle will be impounded unless owner or possessor can provide a reasonable alternative, but consultation with owner or possessor is not required in circumstances where vehicle is unattended, owner is not readily available, or owner or possessor is mentally incapacitated." *Miller v. State,* 430 So.2d at 1309 (1981).

Noting that the police must not use the inventory search as a subterfuge to conduct a warrantless search for incriminating evidence, the requirement of good faith must be coupled with the actual need to impound the vehicle:

> "In determining the reasonableness and necessity for impoundment, consideration must be given to available alternatives when a competent owner or possessor is present or reasonably available." *Miller* at p. 1313.

In remanding the case back to the Second District Court of Appeal for reconsideration of reversal of a suppression order, the Court specifically held:

> "An inventory search of a motor vehicle without such advice or consultation to a present owner or possessor upon arrest results in an unreasonable search under the United States and Florida Constitutions and must be excluded under the Florida Constitution exclusionary rule." *Miller* at p. 1314.

On remand from reversal by the Florida Supreme Court, the Court in *State of Florida v. Miller,* 404 So.2d 159 (2nd DCA 1981) concluded that the failure of the police officers to inform the arrestee that impoundment would not occur if he could provide a reasonable alternative would result in suppression of contents seized during an inventory search, even though the arrestee was informed that his vehicle would be impounded.

In *Sanders v. State,* 403 So.2d 973 (Fla. 1981) the Florida Supreme Court refined the *Miller* decision by holding that an arrestee need not be advised of all available options to impoundment, but he must be consulted as to the impoundment.

> "The extent of the consultation with an arrestee is a factor for the trial judge to consider in determining whether the impoundment was reasonable and necessary." *Sanders* at p. 974.

Although the arrestee was very intoxicated, he was alert, coherent and cooperative and responded to the requests of the officer promptly, and the Supreme Court, in directing that the order of suppression be reinstated, held that the impoundment of the defendant's vehicle was not reasonable under the circumstances in that the defendant was not consulted.

Even though the vehicle in question was partially in a ditch and may have presented a traffic hazard, the patrolman's failure to tell the Defendant that his car was going to be towed away and the failure to give the Defendant a reasonable opportunity to provide an alternative to the impoundment rendered the inventory search of the Defendant's car illegal and the evidence gathered inadmissible. *Moore v. State,* 417 So.2d 1131 (5th DCA 1982).

Again in *Ross v. State,* 428 So.2d 781 (4th DCA 1983) failure to advise the defendant of alternatives to the impoundment of his vehicle resulted in the ultimate suppression of a rifle found during the inventory search of his trunk, said inventory search being held unlawful.

The principle that an arresting officer must advise an arrestee of possible alternatives to impoundment was again established in *Higgins v. State,* 422 So.2d 81 (2nd DCA 1982) wherein the discovery of drugs during an inventory search of the vehicle was held improper because the defendant was not advised of possible alternatives.

In *Long v. State,* 422 So.2d 72 (2nd DCA 1982) the Court held:

> "Because the officer failed to advise Long of his intention to impound the vehicle unless Long could provide a reasonable alternative, the impoundment was improper. Therefore, the subsequent warrantless search of the vehicle and seizure of the physical evidence constituted an unreasonable search and seizure, requiring exclusion from evidence that contraband so seized." *Long* at p. 73-74.

The impoundment and warrantless inventory search of a defendant's automobile is unreasonable when the defendant is not advised that impoundment need not occur if reasonable alternatives are provided; therefore, an unreasonable search and seizure results from the subsequent inventory search. *KJB v. State,* 420 So.2d 114 (2nd DCA 1982), *Judge v. State,* 419 So.2d 1171 (2DCA 1982), *State v. Filter,* 414 So.2d 1127 (2DCA 1982).

Everall v. State, 414 So.2d 646 (1st DCA 1982), discussed the issue of reasonable alternatives to impoundments and held that the alternative of allowing the defendant to call

friends and wait until their arrival was unreasonable so that the resultant inventory search after defendant refused option of signing waiver form was valid and evidence was properly seized.

Even though a warrantless inventory search can be typified as standard procedure of a law enforcement agency, such warrantless inventory search cannot survive constitutional attack if the arresting officer fails to advise the defendant that impoundment of the automobile will occur absent viable alternatives. *Stevens v. State,* 412 So.2d 456 (2nd DCA 1982).

> "An arrestee does not have to be advised of all available alternatives to impoundment, but since the primary purpose of impoundment and an inventory search is for securing and protection of the vehicle's contents, it necessarily follows that when he is reasonably available he should be consulted concerning the impoundment." *Stevens* at p. 457.

In *Rizzo v. State,* 412 So.2d 29 (2nd DCA 1982) failure to advise the defendant that impoundment of his automobile would not occur if he could provide a reasonable alternative again resulted in the suppression of evidence discovered during the inventory search of the defendant's vehicle.

As stated in *Miller, supra,* before an inventory search of a motor vehicle can be validly conducted there must be some showing that the initial impoundment was reasonable and necessary under the circumstances. Where a defendant is available and able to communicate with the arresting officer and is not so incapacitated as to render the resultant conversation an exercise in futility, the failure to consult will result in a finding that the impoundment of the defendant's vehicle is not reasonable. *Sanders, supra.*

Martin Leslie Wells, although admitting to consumption of alcohol, was cooperative with Trooper Adams and conducted himself as a total gentleman. Indeed Trooper Adams would have given Martin Leslie Wells the benefit of the doubt and would have checked fit on the Alcohol Influence Report as to Martin Leslie Wells' ability to drive. The objective facts do not show Martin Leslie Wells' abilities so diminished as to preclude consultation with him concerning the impoundment or pending impoundment of his motor vehicle; without such consultation, the impoundment and inventory search was unlawful and any evidence found as a result of said search should be suppressed.

The impoundment and inventory search of an automobile must be for a good faith caretaking purpose and cannot be used as a subterfuge to conduct a warrantless search.

> "(2) An inventory search is not conducted in order to discover evidence of a crime, and any suggestion that standard police procedure for an inventory search is actually a pretext for an investigative search will require the search to meet traditional probable cause standards or be invalidated." *Miller* at p. 1309.

Trooper Adams felt that the three thousand dollars ($3,000) found on the floor of the car, in plain view, was drug money and he had the car impounded and inventoried. Prior to conducting the inventory search at K & S Automotive he announced that he wanted to inventory the vehicle real good because he felt there were drugs in it. There is a suggestion that this inventory search was a pretext for an investigative search on the part of Trooper Adams; therefore, the search must meet traditional probable cause standards. Three thousand dollars found on the floor of a BMW, with nothing more, does not appear to establish sufficient probable cause to conduct a search without a warrant or to

apply to a neutral magistrate for issuance of a search warrant.

In essence, Trooper Adams had no right to be inside the motor vehicle conducting a warrantless search absent probable cause or exigent circumstance. The search, unreasonable on its face, produced two stub roaches of marijuana found in the ashtray. The two roaches found as a result of the illegal search should be suppressed and fail to provide the necessary probable cause for the further warrantless search of the locked suitcase within the locked trunk of the BMW, Tag. No. YVY660.

The facts of this case do not fall within the purview of *United States v. Ross,* 72 L.Ed.2d 572 (1982) which allowed the police to conduct a warrantless search of a vehicle, including compartments and containers within the vehicle whose contents were not in plain view.

The officers in *Ross*, acting upon information provided by a reliable informant that narcotics were contained in the trunk of a specific car, stopped the car and opened its trunk. The paper bag and leather pouch found in the trunk were opened without first obtaining a warrant. The Court held:

> "Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant." *Ross* at p. 577.

Trooper Adams did not have probable cause to believe that contraband was concealed somewhere within Martin Leslie Wells' vehicle. Mr. Wells was initially stopped for excessive speeding and was subsequently arrested for DUI. The odor of burnt marijuana was not coming from the inside of the vehicle nor was the smell of marajuana coming from any

portion of the automobile. A decision was made by Trooper Adams to impound the vehicle based on the fact that three thousand dollars was seen on the floor of the vehicle. The vehicle was searched by Trooper Adams pursuant to the Automobile Inventory doctrine and evidence discovered during a warrantless impoundment and inventory search that is not reasonable and necessary fails to provide the probable cause necessary under *Ross* to validate a further warrantless search of the locked suitcase found within the locked trunk of the BMW, Tag No. YVY660.

Respectfully submitted,

LAW OFFICES OF HUNTLEY JOHNSON
Post Office Box 1322
Gainesville, Florida 32602
(904) 372-6947
/s/ SHARON EHRENEICH for
HUNTLEY JOHNSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MAUREEN SULLIVAN, Assistant State Attorney, Putnam County Courthouse, Palatka, Florida this 6 day of August, 1985.

LAW OFFICES OF HUNTLEY JOHNSON
Post Office Box 1322
Gainesville, Florida 32602
(904) 372-6947
/s/ SHARON EHRENEICH for
HUNTLEY JOHNSON

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 85-167-CF-J

STATE OF FLORIDA,
Plaintiff

vs.

MARTIN LESLIE WELLS,
Defendant.

ORDER

THIS CAUSE coming before this Court upon Defendant's Motion to Suppress Evidence and this Court having reviewed respective supportive case law, reviewed pertinent testimony, heard oral arguments and being otherwise fully advised, it is

ORDERED and ADJUDGED that the Defendant's Motion to Suppress Evidence is hereby denied.

DONE and ORDERED in Chambers at Palatka, Putnam, County, Florida, this 9th day of August, 1985.

/s/ E. L. EASTMOORE
E. L. EASTMOORE
CIRCUIT JUDGE

cc: Maureen D. Sullivan
Assistant State Attorney

Huntley Johnson
Attorney for Defendant

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 85-167-CF-J

MARTIN LESLIE WELLS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

NOTICE OF APPEAL

NOTICE IS GIVEN that MARTIN LESLIE WELLS, Defendant, Appellant, appeals to the Fifth District Court of Appeals, State of Florida, the Order and Sentencing of this Court rendered October 29, 1985. The nature of the order is a final order based upon a plea of Nolo Contendre with an express reservation of the right of appeal from the denial of the Amended Motion to Suppress, filed in this cause. The State of Florida stipulated that the Amended Motion to Suppress was dispositive of the case.

I HEREBY CERTIFY that copy of the foregoing has been furnished by Hand Delivery to MAUREEN SULLIVAN, Assistant State Attorney, Putnam County Courthouse, Palatka, Florida 32077; and by U.S. Mail to JIM SMITH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, this 29 day of October, 1985.

LAW FIRM OF HUNTLEY JOHNSON
/s/ HUNTLEY JOHNSON

HUNTLEY JOHNSON
Attorney for Defendant/ Appellant
Post Office Box 1322
Gainesville, Florida 32602
(904) 372-6947

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 85-167-CF-J

MARTIN LESLIE WELLS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

DIRECTIONS TO CLERK

DEFENDANT/APPELLANT, Martin Leslie Wells, directs the Clerk to include the following items in the original record described in Rule 9.200(a)(1).

1. Copy of Defense Amended Motion to Suppress dated August 2, 1985.

2. Copy of Defendant's Memorandum of Law in Support of Motion to Suppress dated August 6, 1985.

3. Transcript of all proceedings with any exhibits relating to Defense Amended Motion to Suppress heard before The Honorable E. L. Eastmoore, Circuit Judge, on August 8, 1985.

4. All depositions and exhibits filed in the above-styled cause.

5. Copy of the Order denying the Amended Motion To Suppress.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Clerk of the Circuit Court, Putnam County Courthouse, Palatka, Florida 32077; and to JIM SMITH, ATTORNEY GENERAL, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 by U.S. Mail this 5 day of November, 1985.

LAW FIRM OF HUNTLEY JOHNSON
Post Office Box 1322
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(904) 372-6947
/s/ SHARON EHRENRICH
HUNTLEY JOHNSON

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 85-167-CF-J

MARTIN LESLIE WELLS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

DESIGNATION TO REPORTER

DEFENDANT/APPELLANT Martin Leslie Wells files this designation To Reporter and directs the Court Reporter to transcribe an original and two copies of the following portions of the trial proceedings to be used in this appeal:

1. The entire hearing on the Amended Motion To Suppress held before the Honorable E. L. Eastmoore on August 8, 1985 and recorded by the Reporter.

2. The Court Reporter is directed to file the original with the Clerk of the lower tribunal and to serve one copy on each of the following:

a. Huntley Johnson, Esquire, P. O. Box 3122, Gainesville, Florida 31602.

b. The Honorable Jim Smith, Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

I HEREBY CERTIFY that copy of the foregoing has been furnished by U.S. Mail to E. WESLEY ELLIOTT, Official Court Reporter, Putnam County Courthouse, Palatka, Florida 32077; and by U.S. Mail to THE HONORABLE JIM SMITH, Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida this 5 day of November, 1985.

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/s/ SHARON EHRENRICH
HUNTLEY JOHNSON

IN THE CIRCUIT COURT OF FLORIDA, SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY

CASE NO.: 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

DEPOSITION OF RODNEY ADAMS

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Room 100, Palatka, Florida, commencing at 3:00 p.m., on Tuesday, June 4, 1985.

APPEARANCES:

HUNTLEY JOHNSON, Esquire
Post Office Box 1322
Gainesville, Florida
of counsel for the Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida 32078
of counsel for State of Florida

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STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

All objections, except as to the form of the question, be reserved until hearing on same or until trial.

Thereupon,

RODNEY ADAMS,

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: Trooper Adams, I have not noticed this deposition for the DUI charge that's a companion charge with the possession of marijuana and the possession with intent to sell, but with your permission and with Ms. Sullivan's permission, which she has already given, I would like to inquire into the matters about the AIR as well.

Do you have any problems with that?

A: Not at all.

Q: What is your date of birth, Trooper Adams?

A: 12/24/59.

Q: And where did you go to police standard school?

A: FHP Academy, Tallahassee.

Q: You did not go to a police standard school other than that?

A: Other than that, no.

Q: So the entirety of the police training that you had was at FHP Academy in Tallahassee?

A: That's right.

Q: What were the dates that you attended that school?

A: I would say the time I got in was April the 26th through July the 13th of '84.

Q: July the 13th was the last day?

A: Graduation day.

Q: My brain is not working as well as it does sometimes. How many weeks is the school?

A: Twelve.

Q: And then what happens after that as far as your training goes?

A: We're put on the road with an officer — senior officer and trained for a month as far as being on the road and what routines and what, more or less, procedures we are to follow.

Q: And who was that officer?

A: Well, there were a number of them; mainly it would be two of them, Harvey Keeling and Dennis Rodabaugh.

Q: And where was this?

A: This was here in Palatka.

Q: And when were you put on the road in your own vehicle?

A: The first week of — it had to be the second week of August, somewhere along in there.

Q: And is there a probation period whereby if you foul up, say, within six months or something like that, then you can be relieved of duties permanently?

A: Yes.

Q: How long is that probation period?

A: Six months — nine months rather.

Q: You have completed that.

A: Right.

Q: How do the shifts break down in Palatka? Is is twelve to eight, eleven-thirty or seven-thirty, what I'd call the midnight shift?

A: Guys come on at odd hours — seven to three on days, eight to four on days, twelve to eight in the morning or eleven to seven, whichever works out with them.

Q: Which particular shift were you on on this evening?

A: Three to eleven.

Q: Three p.m. to eleven p.m.?

A: That's right.

Q: Can you tell me where you were patrolling when you came into contact with Mr. Wells' vehicle, and I use that in the sense that it was his vehicle, that he was driving it that night.

I think you have found since that the ownership was not with Mr. Wells and it was not his vehicle.

A: That's true.

At the time I was called by one of the other officers to assist in transporting some young guys to points or areas where they could make a phone call so they could go home.

I took one guy to Hastings and I was on my way back —

Q: What time was this, about?

A: This was before ten.

Q: Okay.

A: This is before ten o'clock because I stayed over there about fifteen or twenty minutes with the guy until somebody came by to get him.

Q: And then after you took care of that matter, tell me what road you were on or where you —

A: 207 southbound back to Palatka, and that's when I got Mr. Wells, I got him for speeding.

Q: You got him doing sixty-one in a fifty?

A: Right.

Q: And I understand there's already been a hearing on that in which Judge Miller inquired as to the tuning fork and the calibration and all of that business; is that correct?

A: As far as Mr. Wells' case?

Q: Yes.

A: On the speeding case?

Q: Yes.

A: I have not been subpoenaed for a case on Mr. Wells.

Q: Now, when Mr. Wells' vehicle was approaching you, was there any unusual movement the car made other than the fact that the radar showed it was going in an excessive speed?

A: None.

Q: You turned around and went in pursuit.

A: That's right.

Q: Did you notice any unusual actions about the vehicle before you stopped it?

A: None.

Q: And the manner in which Mr. Wells parked the vehicle off the shoulder of the highway was appropriate, in your opinion?

A: That's true.

Q: In your own words, with me interrupting you occasionally I'm sure, if you'll go ahead from there.

A: From that point I got out, and immediately after I got out so did Mr. Wells. He approached me halfway between the cars and asked me what was the problem, Officer, and I told him that I got him doing sixty-one in a posted fifty-mile an hour zone.

He proceeded to show me his driver's license, and he was trying to use some kind of term to say — more or less to get me to not write him a ticket for the speeding and to just let him go on to St. Augustine, where he was going.

I asked him about his license —

Q: Just a minute.

Did he indicate to you why he thought you should give him a break?

A: No, he just wanted to go on, other than he was tired. He had been traveling from — I think from Hawthorne or somewhere.

Q: Did you ask him what his business had been in Hawthorne?

A: No.

Q: So if I had been standing on the side of the road watching this, what I would have seen is Martin Wells saying to you: "Officer, could you give me a break?"

A: That's right.

Q: And he was, according to the AIR, cooperative and friendly and exhibited good American citizen-type behavior the entire time; is that correct?

A: That's true. I wouldn't call him a number one trooper person, but yes —

Q: Well, that's based on what you found in the trunk of someone else's car, right?

A: Yes; matter of opinion.

Q: Prior to finding the marijuana, Martin Wells had conducted himself as a total gentleman in your presence; is that correct?

A: That's true.

Q: What did you say when he asked you to give him a break?

A: I told him — accompanying with his asking to be given a break, he also told me that his license was suspended or revoked, one or the other, and I told him that we'd find out.

I called it in and it came back — I don't recall him having anything more than just expired or if any violation had been taken against his driver's license.

Then I asked him —

Q: It didn't seem as heavy as he had thought it was going to be.

A: That's right.

Q: It didn't come back revoked or suspended like he thought it might.

A: That's right.

Q: Okay.

A: And then I noticed the smell of an alcoholic beverage on his breath, and I asked him had he been drinking and he said yes, and that's when he began to tell me where he had been and what he had been doing.

Q: What did he tell you?

A: He told me he had been at this bar in — it's not really in Hawthorne, it's in Johnson — just down from Johnson, and I forget the name of it, but anyway he said he had been drinking a few beers, he had tried to get a young lady to spend the evening with him and failed, that he was tired and was trying to make it to St. Augustine.

Q: This was not his night, was it?

A: Evidently.

Q: He failed in his attempt to procure companionship for the evening.

A: That's right.

Q: Is that one manner of putting it?

A: That's right.

Q: Or in other words, he was trying to pick a girl up and she turned him down.

A: That, too.

Q: So at that point he was heading back to St. Augustine.

A: Right.

Q: At that point did you decide to administer the roadside tests?

A: I did, and I went ahead and let him walk through his tests, and based on my opinion, he didn't perform as well as he should have.

Q: Well, his attitude was cooperative and polite, the color of his face was normal, his eyes were normal, his pupils were normal.

Tell me how you tested his eyes and his pupils.

A: How I tested his eyes and pupils?

Q: Did you shine a flashlight in his eyes?

A: That would only distort them if I shined a flashlight in his eyes.

Q: Let me share with your my experience, and maybe I've been given some bad information.

A: Okay.

Q: But it's my understanding that one of the manners in which to test the pupils' reactions to light is to flash a light in it and see how the pupil reacts.

There is supposed to have been some training, I understand, as to if it reacts in a certain way, then it indicates

either marijuana or alcohol consumption or possibly even something as heinous as cocaine.

Now, are you familiar with the test I'm discussing with you?

A: There is a test but it's not to shine a flashlight.

Q: What is it?

A: It's a nystagmus test.

Q: I'm not talking about the nystagmus test. I know the nystagmus test is when you take your finger and you move it all the way out to each side.

Are you trained in that?

A: Right.

Q: Did you perform that test?

A: Oh, yes.

Q: Where is the report on this nystagmus test? There is a completely different form for that.

A: We don't carry a form — we don't use a form, per se, at our office as far as the nystagmus goes.

Q: How would someone know by looking at these documents that you have performed a nystagmus test? What particular area would you have made a mark in, eyes?

A: As far as putting it on the —

Q: Yes.

A: I wouldn't have put it on here, period.

Q: The nystagmus test, if I understand it, can even tell if someone been smoking reefer rather than drinking alcohol.

Is that supposed to be correct?

A: Can tell?

Q: In other words —

A: That would be totally news to me.

Q: The reaction to the nystagmus test would not show up if someone had only been sm oking marijuana?

A: That's not what I've been taught.

Q: Your understanding is that the nystagmus test is only for alcohol?

A: It gives an indication of giving an approximate of how much a person has been drinking.

Q: I understand that there is a certification for the nystagmus test.

Do you have such a certification?

A: As far as going to school for it?

Q: Yes.

A: And proof of showing it on a card?

Q: Right.

A: I have been through the training, yes.

Q: Are you certified to give the nystagmus test as far as —

A: Yes, I am.

Q: You are certified to do so and you have documentation that shows that?

A: Not here.

Q: But you do have documentation.

A: On record, yes.

Q: I'm not going to question that.

A: On record, yes.

Q: And you had that when you went through FHP?

A: After I came out of the academy, we had it here.

Q: And who was your instructor?

A: Marvin Smith.

Q: Is he here?

A: He's in this area, yes.

Q: How did he do on the nystagmus test?

A: Fair.

Q: About a .08ths worth?

A: I cannot say that he did a .08ths worth by the jumping in his eye with a pen. I can't say that's exactly what he would have been doing as far as blowing on a machine.

Q: Let me put it this way, Trooper.

Were you surprised that he only blow a .08 considering what you had seen of his eyes when you performed the nystagmus test?

A: To a certain extent, yes.

Q: You had anticipated that he would blow higher than that.

A: Slightly.

Q: Along about a .10?

A: Maybe a .12.

Q: Officers often, in my experience, sort of guesstimate in their own mind what somebody is going to blow before they blow.

A: That's right.

Q: Have you had that experience?

A: Yes.

Q: So you thought he'd blow about a .12?

A. Right.

Q: And that's based on the nystagmus and the performance tests?

A: And based on how much he told me he had to drink and the amount of time lapse from the time he left the bar and he'd been on the road.

Q: And you asked him all those questions before you arrested him?

A: Right.

Q: And you asked him when he last ate before you arrested him?

A: No. All of the stuff that you see on the back of the form, I have no questions asked from that until I read him his rights.

Q: My point is this. You asked him, or rather he volunteered, whichever you prefer to put it, how many beers he had had, the time period in which they had been consumed, and in addition to that, how long he had been on the road, correct?

A: That is volunteered.

Q: Right, but you had that information.

A: Right.

Q: And all of those things indicated that he should blow about a .12 - three beers in about the time period that's shown here and has had time to get in the blood, he would have probably blown between a .09 and a .10.

A: That's a possibility.

Q: But one of the very important factors is what and when he consumed food; is it not?

A: That's true.

Q: So you did not have that information to consider when you decided to arrest him.

A: That's true.

Q: And that would have been something that may have altered your thinking about what he would have blown had you known what he had eaten as you were standing there beside the road.

A: Possibly absorption. That I can't say as far as being food there and having something to do with absorption of the alcohol.

Q: You can't say.

A: Right.

Q: You have not had training as to the differences between drinking alcohol when you have food in the stomach?

A: Yes, I've been through all of that. That's part of the school, itself.

Q: And your experience is that if someone eats, then there's going to be what?

A: Their food will absorb the alcohol.

Q: And as a result of that, there will be less alcohol in the blood.

A: That's true.

Q: Correct?

A: That's right.

Q: Now, tell me how you had him perform the balance tests. What did you tell him to do?

A: Heel-to-toe, watching your feet as you walk, count your steps out loud and then turn at a certain point.

Q: Turn when you get to a certain number?

A: To a certain point. I would give him the cue to turn.

Q: So counting them out loud, but it's not like you say after thirteen steps, "turn," you're going to say, "Surprise, turn (demonstrating)."

A: More or less.

Q: Well, I've been through nine hundred of these, Trooper Adams, and what I'm saying is —

A: I understand what you're saying.

Q: You're going to suddenly (demonstrating), and I'm supposed to do a magical about-face.

A: That's right.

Q: How did he do that?

A: Slightly off.

Q: Slightly off on what, the turn?

A: The turn and the walking as far as trying to keep his heels and toes directly touching in a straight line because he was walking on the roadway.

Q: On the line?

A: On a line, that's right.

Q: Could you show me so that I might visualize what you saw and the discrepancies that you saw in the manner in which he handled it.

A: Like so, and I'm trying to pinpoint his balance (demonstrating).

Q: So the heel would actually be right up against the toe, but he was —

A: That's the way I'm doing it. I'm saying space between the heel and toe (demonstrating).

Q: How much of a space?

A: More or less here, sometime there (demonstrating); it all depends.

Q: As you've got your right foot in front of your left one there, it's probably about — we're talking maybe six inches.

A: Three or four at the most.

Q: Three or four inches.

Would he correct that by bringing his foot back after he initially placed it there or would he go ahead and take the next step?

A: Go ahead and take the next step and try to —

Q: Sometimes he was making the heel touch the toe and sometimes he was not —

A: Spacing, and sometimes —

Q: Sometimes spacing, sometimes up against —

A: That's right.

Q: Show me the turn. When he did the turn, what did you see?

A: Go like this (demonstrating), then a sway to there like this (demonstrating) to catch himself, come back up again on two.

Q: How many times did you have him turn?

A: Once.

Q: Trooper Adams, if you look at this Performance Test, I've never been able to quite understand which would be worse, to be unsure or to be swaying.

I mean, does it go that the worst is on the left and the best is on the right?

A: That's right.

Q: So unsure would not be as bad as swaying.

A: No.

Q: Is that right?

A: At least there is somewhat that — some indication that he does have the ability to judge what he's doing.

Q: Which would be what, swaying?

A: Unsure.

Q: So unsure, he had the ability to understand what he's doing?

A: More or less.

Q: More or less.

A: Give or take, yes, to judge what he's going to do.

Q: He was real close if he's unsure.

A: Right.

Q: And if you're swaying, you're not wobbling and stumbling and staggering and falling down and needing support, so you're obviously not doing too bad there, either.

A: And not doing too great, either.

Q: But you're not — you're definitely not falling down or staggering.

A: That's right.

Q: He didn't have any of those characteristics.

A: No, he didn't.

Q: Finger-to-nose, hesitant.

A: Right.

Q: He touched the end of his nose but he was slow getting it there?

A: That's right.

Q: If you could, with either hand, show me about the speed at which — tell me what I would see if I had been there and seen it, is what I'm saying.

A: If you would have been there, you would have saw him bring his hand around, and his finger, and then begin to try to exactly find the actual point on his nose (demonstrating).

Q: He found it but he was hesitant.

A: Somewhat, yes.

Q: Have you ever given anybody a citation for DWI where you checked effects of alcohol, slight, as opposed to obvious?

If you'll look down in the box, the first one below Observer's Opinion, you've got obvious as to officer's opinion.

A: Have I given anybody a slight?

Q: If you've ever put a slight down there, have you charged somebody?

A: No.

Q: Okay.

A: As far as I know, I haven't.

Q: So my point is that the dividing where you make a personal decision to charge somebody or not would be that if you were going to check slight, you wouldn't even bother to arrest them, right?

A: I wouldn't say that, either.

It would depend mainly on the tests as far as that goes, and then everything would have to be way beyond swaying and ...

Q: Have you ever, in your recollection, checked slight in that box and arrested somebody for DWI?

A: As far as I know, I have never checked slight.

Q: Ability to drive, you did not check anything.

Do you have an opinion as we sit here now as to whether he could have driven or not?

A: Yes.

Q: He could have driven.

A: That's a possibility.

Q: You would have checked fit then; is that correct?

A: Perhaps. I'm not going to say, really, because, like I said —

Q: Trooper Adams, in your training, as I understand it from my limited experience in this area, you are trained to check one of those boxes; are you not?

A: That's right.

Q: May I assume it was an oversight?

A: It was an oversight, believe me.

Q: But if it had not been an oversight, then you would have checked one or the other.

A: That's true.

Q: Now, I know it's been awhile, I think this was in February —

A: Right, it was in February.

Q: Which one would you have checked, can you tell us?

A: I'll give you the benefit of the doubt —

MS. SULLIVAN: Let me just, for the record, object to it because it's a hypothetical, okay?

MR. JOHNSON: Fine, objection noted.

MS. SULLIVAN: Go ahead.

BY MR. JOHNSON:

Q: You would have given him the benefit of the doubt on what?

A: I would have given him the benefit of the doubt. I would have went ahead and put fit.

Q: The basis for that, Trooper Adams, would have been because you followed the guy for awhile, and even though he had been speeding when he passed you, the car was being handled pretty well.

A: True enough.

Q: Trooper Adams, I have had law enforcement officers testify that they thought they could determine what type of alcohol it was that somebody consumed based on the odor that they smell.

Do you have that ability?

A: No, I don't.

Q: I don't either and I'm real shocked when people do.

You have no reason to believe he was drinking anything other than beer, do you?

A: That's what he told me.

Q: Did you see any empty beer cans or beer bottles in the car?

A: I can't recall any.

Q: Well, you at some point did inventory the car.

A: I did.

Q: And if you had —

A: But that's been awhile since I did that, and if there was a beer can in there, I can't remember if there was or not.

Q: Okay.

A: I do remember seeing an oil can.

Q: On the handwriting specimen, do you recall what instructions you gave Mr. Wells?

A: Sure. I told him to write anything that — in that box that he felt like he wanted to write. I told him that he would not be admitting to any guilt of any kind, that he could write his name or anything he saw around him, just so long as he wrote something in there, that it would be fine.

Q: Did you ascertain when you were talking to Mr. Wells where he worked?

A: Yes, it has to go on the form.

Q: Well, the form says car salesman. What I'm asking is did you find out where?

A: Right. It has to go on the form, the 751 that has to be filed with the sheriff's department.

Q: Where does he work?

A: He told me he works for Kurt's Auto; I think that's where it is.

Q: Did he tell you what kind of work Kurt's Auto was?

A: Just that they sold cars.

Q: Buy and sell cars.

A: I took it that they were salesmen and that was it.

Q: Did Mr. Wells indicate to you whose car this was before you arrested him?

A: He said it was a friend of his that was going on some kind of a trip and he was keeping it for him.

Then he came back and told me that he wanted the car sold — his friend wanted to sell the car and he had sold the car.

Q: Who had sold it?

A: He had, was selling the car.

Q: Here's my problem, we've got two hes.

A: Mr. Wells.

Q: Said that he, Mr. Wells, had sold the car.

A: Or was about to sell the car.

Q: In the process of selling the car.

A: Right.

Q: Now, I assume, Trooper Adams, that you asked Mr. Wells to produce the registration for the car.

A: I did.

Q: And could he find it?

A: No, he could not — well, he showed me a title, I believe. It was a Virginia title or something like that.

Q: Did it show the name of the owner on the title?

A: A Joe Turner.

Q: Did you ask him who Joe Turner was?

A: That was his friend that had left the car with him.

Q: Did Mr. Wells give you any indication as to how long he had had the car in his — under his control —

A: Based on the way he acted when I asked him, it would appear to have been anywhere from a couple of days to a few weeks.

Q: Not too long?

A: Not too long.

Q: When were those questions asked, about the time he couldn't find the registration?

A: No, this was stuff that he told me on his own when we were standing on the road and once we got to the station.

Q: I have seen the State Attorney's file and you have prepared a one-page, what I will call a narrative, in this particular case stating there was a routine stop and so forth.

Do you know the document I'm referring to?

A: I do, an affidavit, yes.

Q: Did you keep any written notes that resulted in what is titled Arrest Affidavit and starts out: "On the 11th day of February, 1985, I was travelling south," and is signed by Trooper R. A. Adams?

Did you keep any notes on that?

A: I have it.

Q: All right.

A: One that's written.

MR. JOHNSON: Have we got that document, Maureen?

MR. SULLIVAN: Do we have the document?

A: This is the same information, it just has to be put on an FHP —

Q: Is it exactly the same wording?

A: Wording is the same, everything.

Q: Did you write it out or did you dictate this to somebody?

A: No, I went ahead and typed it from memory, and then I had it retyped when —

Q: "Now when you say you typed it from memory, the document that appears before you now, is that the one —

A: Is a copy of that one (indicating).

Q: Okay.

A: Everything that was on that one was typed off of that one onto this one.

Q: But you typed this document, yourself?

A: I did.

Q: And then it was retyped by a professional typist onto the form, which is the 751?

A: This is an FHP Incident Report.

Q: Just because you wanted it to be letter perfect. There's a couple of —

A: Well, it had to go to Tallahassee and it has to be put on a certain form.

Q: When did you type out this arrest affidavit?

A: It was a couple of hours — a few hours after I made the arrest.

Q: This document was then in the file — the next morning when this young man appeared before the Judge, it was already in the file?

A: It was.

Q. Now, how many law enforcement officers were at the scene where the car was stopped on 207?

A: I can only recall three deputies and one FHP officer.

Q: Larry McKenzie was there?

A: Right.

Q: Joe Cobb?

A: I can't recall if Joe was there or not. I know John Milton was.

Q: Who?

A: John Milton.

Q: M-i-l-t-o-n?

A: That's right.

Q: And this is the Putnam County Sheriff's Office?

A: Right, and Keith Reddick was there.

Q: Keith Reddick?

A: Right.

Q: R-e-d-di-c-k?

A: Right.

Q: All right.

A: And the third SO officer I don't remember.

Q: How about Tim Brown?

A: I don't recall if Tim was there or not.

Q: The reason I'm asking this is not a mystery at all, Trooper.

When we sent — when you-all sent the lab report in —

A: I understand.

Q: —Joe Cobb and Tim Brown's name appear on it. Apparently they had handled the evidence - the suitcase and the garbage bags and so forth.

Now, you are checking for the registration, he can't produce one. Are you concerned that maybe the car is stolen at that point?

A: I am. If it's stolen, we run the tag — the registration through from the tag and see what comes back on it.

Q: Did you run the tag?

A: Oh, yes.

Q: What did you get back?

A: That it was registered to Joe Turner. So it was legal at the time, what he had told me was straight.

Q: What Mr. Wells told you was straight.

A: Right.

Q: That, in fact, Joe Turner was the owner.

A: That's right.

Q: Now, prior to your running the tag, as nearly as you can recall tell me the essence of the conversation between you and Mr. Wells prior to your running the tag.

A: There was no real conversation other than we did the test and everything and I ran the tag and — only him saying that he didn't believe that this was happening to him, that kind of stuff.

Q: About the DWI?

A: Right, and everything, the stop and all of it all in one night.

Q: Did he look upset?

A: Somewhat.

Q: Scared?

A: Possibly.

Q: We've got the registration not there, so then we've got to run the tag, and he tells you the car should be registered to Joe Turner.

A: He tells me the car is registered to Joe Turner, yes.

Q: That's the essence of the conversation between you-all prior to you running the tag, correct?

A: That's right.

Q: You run the tag — have you already decided to arrest him by then?

A: No.

Q: So we're before the test?

A: That's right.

Q: We're before the field sobriety tests when you're trying to ascertain if the right person has got the car.

A: Right.

Q: And you've also run his license at this point.

A: That's right.

Q: So you-all have had minimal conversation after Martin says: "Please give me a break."

A: Right.

Q: Then he admits to you that he thinks his license is revoked, then he tells you that Joe Turner is the owner of the car.

At that point you run the tag and you run his license.

A: That's right.

Q: And all the information that he gives you comes back to be correct, right?

A: That's right.

Q: Then during the course of that conversation, the odor of alcohol.

A: That's right.

Q: And then the tests, right?

A: Yes.

Q: At which point in this scenario does he start saying: "I can't believe this is happening to me?"

A: This is after everything has been — the tests have been done and I tell him that — I read him his implied consent and that I'm going to take him down to have him blow on the machine.

Q: And that he is under arrest for DWI?

A: That right.

Q: Did you tell him that if he went and blew on the machine and passed that you would not charge him with DWI?

A: I did not tell him that.

Q: I'm not suggesting that he said that, I'm asking because I don't know.

A: No, I did not tell him that.

Q: Now, at that point something unusual occurs when he goes back to retrieve something out of the car; is that correct?

A: That's right.

Q: Tell me what that was.

A: He asked me to — if he could get his jacket because it was cold outside, and I said yes, and I told him that I would approach the car with him —

Q: Because you didn't want any guns to come jumping out from underneath the front seat.

A: That's right, to protect myself.

Q: That was what your concern was.

A: That right.

Q: So where was his jacket?

A: It was in the — it was either the back or the — on the passenger side on the seat.

Q: And while he is retrieving that, I assume the door is open?

A: That's right.

Q: And I assume the inside light is on.

A: Right.

Q: And do you have your flashlight.

A: That's right.

Q: And what are you doing with your flashlight.

A: I'm shining it into the car to make sure that he doesn't get anything out as far as a weapon or anything.

Q: Do you shine it on the jacket?

A: I shined it in the whole car.

Q: So you were making a visual surveillance of the car with your flashlight to protect yourself.

A: That's right.

Q: From him arming himself.

A: That right.

Q: Did you ever suggest to him that you retrieve his jacket?

A: No, I let him go ahead and get his ...

Q: So while you're flashing the light around, what do you observe that causes you interest, shall we say?

A: First off, as soon as I opened the door, I automatically saw the money because it was just lying out there on the floor right in plain view and —

Q: Nice phrase.

A: And —

Q: On the floor in plain view on which side of the —

A: On the driver's side.

Q: Was it even partially concealed from — by the seat?

A: No, not at all.

Q: And was it packaged or just laying all —

A: It was just lying there (demonstrating).

Q: You have moved your hands apart about three feet. Was there like a three-foot wide —

A: No.

Q: Give me an idea of what I would have seen, is what I'm asking for, as far as the money.

A: The money was just separated and it was just scattered on one little small area.

Q: If you could, with your hands, indicate.

A: Something like that (demonstrating).

Q: About a foot?

A: A little less than a foot.

Q: Was it neatly —

A: At one time you could tell it had been neatly stacked.

Q: It had been a stack.

A: Right.

Q: And due to the movement of the vehicle stopping and so forth, the stack had slid down.

A: Right.

Q: Was it rubber-banded off where there was various amounts that were in rubber bands?

A: Right, some of it was.

Q: And how much did that turn out to be, per rubber band package?

A: A thousand to a band.

Q: So there where three bands?

A: That's right.

Q: So you had three groups of money that had been in a stack, apparently, based on your experience.

A: One had been taken — the band had been taken off one of them, that's the one that had been scattered, and I assumed he had gotten some money out of it, which that's only an assumption, and —

Q: Did it turn out to be exactly three thousand dollars?

A: It sure did.

Q: That money appearing caused you concern.

A: Right.

Q: You immediately assumed that drugs were involved.

A: No, I didn't.

Q: Why did that money cause you concern?

A: My curiosity was aroused as to why a person would carry that amount of money on the floor, just lying there, with no thought of securing it otherwise.

Q: What did you find to be odd about that.

A: That is, just lying on the floor.

Q: Instead of in the glove compartment, for example.

A: Out of sight, keeping it from somebody — making sure that it was unaware to the public, so to speak.

Q: Well, you can't testify as to whether or not that money had been previously shoved up under the seat and had come out as a result of the inertia of stopping the car, can you?

A: No.

Q: Is is quite possible, then, that the money was shoved up underneath the seat of the car as would be expected to hide it from the public, as you put it?

A: Perhaps.

Q: ou don't have any information that would negate that possibility.

A: No, I don't.

Q: Did you make an inquiry of Mr. Wells as to the origin of that money?

A: I asked him why did he have so much money on the floor.

Q: On the floor?

A: Right.

Q: You weren't concerned about him having so much money but the fact that it was on the floor.

A: Right.

Q: Okay.

A: That did he always leave his money out like that.

Q: And what did he say?

A: He said: "Well, I just sold the car — made a deal on a car and I didn't have time to put it up."

That was the first story. The second one was —

Q: Wait a minute, I want to hear the whole first story before we get to the second one.

A: That was it, that was it.

Q: Okay.

A: He didn't have time to put it up anywhere and he just put it down on the floor.

The second time he came back and said —

Q: Now, when is that going to be?

A: This is shortly after that statement.

Q: Still on the side of the road?

A: Still on the side of the road. He said —

Q: Wait a minute, I want to do this a little different way. I want to hear this but I want to know what was said before we get up to there.

A: This is all in one conversation.

Q: Right.

A: This is directly afterwards. This is only a sudden pause and a break in the conversation, and he tells me that he didn't have time to secure it. Then he tells me that the money belongs to his friend, Mr. Turner.

Q: He specifically said Mr. Turner.

A: Right, and he was unaware of the money being there.

Q: So originally Mr. Wells indicates that the money was from a car sale that he had made.

A: That right.

Q: Which clearly indicated he knew the money was there.

A: Right.

Q: And then Mr. Wells says to you — did he say: "No, I'm sorry, that's not true," or did he just pause and say: "That money is not mine, it belongs to Mr. Turner and I didn't know it was there?"

A: Right.

Q: Did you ask him how he knew it belonged to Mr. Turner if he didn't know it was there?

A: No, this is what he said. He said they had made a deal previously and they were going to split it on the car, that the deal was made previously and Joe evidently left the money in there.

Q: He went on to give you that detail.

A: He sure did.

Q: Now, at some point later on did you take a sworn statement from him down at the sheriff's office?

A: No.

Q: Did anybody?

A: No.

Q: Did any of the investigators interrogate him, to your knowledge?

A: Not to my knowledge.

Q: They had made a deal, they were going to split the money, but that he didn't know the money was in there?

A: That's right.

Q: How many people were present when he made this statement to you?

A: Just he and I.

Q: Did he ever repeat this statement in front of anyone else, to your knowledge?

A: As far as I know he didn't.

Q: Now, you have read him his rights when you placed him under arrest for DWI.

A: I read him the implied consent. I read him his rights when he got to the station.

Q: And that was the first time you read him his rights is when you got to the station.

A: That's right. Before I do any questioning, I always do that.

Q: Before you do any questioning you always do what, read them the implied consent?

A: I read them their rights — before I question them then I read them their rights.

Q: You mean before you get the answers that are on the back of the AIR?

A: That's right.

Q: That's when you read them their rights.

A: Right.

Q: So that's your SOP.

A: So to speak.

Q: One thing I have found is that even though there may be a manual, that each individual officer has his own SOP.

Your SOP is to place someone under arrest and then read them the implied consent to find out if they're going to take the Breathalyzer.

A: I read them the implied consent, and then after I do that, then I place them under arrest, take them down, with their agreement to do the test, and then after they do the test, I read them their rights.

Q: And that's — virtually every case you do it the same way.

A: Yes.

Q: Now, what else does Martin say when we're here and he is now telling you he knew the money was there, he didn't have time to put it up, then he didn't know the money was

there, that he and his partner had made a deal to sell the car and they were going to split it but he didn't know the money was there, right?

A: Right.

Q: Now, this money is all the way out on the floor, so where if you had been sitting in the driver's seat, would you have had any difficulty whatsoever seeing the money?

A: No.

Q: But he tells you that he didn't know it was there.

A: Right.

Q: Now, did you get in any further conversation about the origin of the money at that point?

A: No, I didn't.

Q: Were all the officers that you previously named present at the time that the trunk was attempted to be opened there on the highway?

A: Larry McKenzie was.

Q: He was the only one?

A: He was standing there with me when I tried it.

Q: Are you right-handed or left-handed?

A: Right.

Q: You put the key in?

A: Right.

Q: And you tried to turn it?

A: I let him try first, Mr. Wells.

Q: You let Mr. Wells and he couldn't get it open.

A: Right.

Q: And then you tried it.

A: And it wouldn't open then.

Q: You couldn't get it open.

A: No.

Q: And as I have learned from talking to Hoss and to Williams from K and S, you have to push in the button and then turn the key before the trunk will open.

Is that correct?

A: I believe so.

Q: We'll, do you have a recollection of that?

A: No, I don't.

Q: Do you have —

A: Because at the time I went back out to inventory the car, I stuck the key in and turned it.

Q: You did?

A: Right.

Q: So when you got back out to K and S, you got the key and you just stuck it in and turned it.

A: Right.

Q: But it didn't work that way on the highway.

A: On the road it seemed jammed.

Q: And when you put — we're at K and S now, later on at the inventory, and when you put the key in to turn it, apparently you depressed the button and it opened; is that correct?

A: I guess that's how it works. I'm not familiar as far as it going in, suppressing itself and opening.

All I know is I put it in there and it opened.

Q: So no one gave you any instructions between the time that you tried it on the highway and when you opened it as to how to open it; is that correct?

A: That's right.

Q: You just tried it again and this time it opened, whereas it didn't out on the highway.

A: That's right.

Q: Now, do you remember who all was there when you opened the trunk of the car at K and S?

A: Just the two guys that work at the wrecker service.

Q: Did you see them here today?

A: Right.

Q: There's a big one, and his name is Hoss.

A: Right.

Q: And then there is a more diminutive one whose name is William.

A: Right.

Q: Who had Ed on his shirt today?

A: That's right.

Q: Those were the two fellows that were there?

A: Right.

Q: Now, after you opened the trunk of the car at K and S, can you tell me what you saw.

A: We opened the trunk and opened all the doors to the car, and we went ahead and started inventorying from the front back, the three of us, and —

Q: Let me get this clear.

My little bag at a deposition is to try and picture in my own mind where people were and whatnot.

A: Okay.

Q: The first thing you did when you got there was open the trunk?

A: Right.

Q: Then you opened the doors.

A: Right.

Q: With the trunk open and the doors open, you searched from the stem to the stern.

A: That's right.

Q: Did you look in the engine?

A: No.

Q: What did you search in the passenger area?

A: Ashtray, the glove compartment, underneath the seats, behind the seats, anything that would be down underneath the back seat —

Q: You put your hands down inside the — like if somebody loses a quarter and it falls into the crack; you felt that all.

A: Right.

Q: I understand you found two roaches?

A: Right.

Q: And you were in the ashtray.

A: Right.

Q: Now, did you have any way of telling how long they had been there?

A: No.

Q: The roaches.

A; No.

Q: Did you detect the odor of marijuana about the vehicle when you first stopped Mr. Wells?

A: No, I didn't.

Q: And I'm talking about burned marijuana, the smoke and the odor that comes from that.

A: No, I didn't.

Q: And when you stopped Mr. Wells, you didn't detect the odor of marijuana coming from inside the suitcase inside the trunk either, did you?

A: No, I didn't.

Q: So those roaches could have been there for a year or for ten minutes.

A: That's true.

Q: Is that fair enough?

A: That's true.

Q: You preserved those and put them in evidence.

A: Right.

Q: Now, when you say, "we" searched, this was under your supervision; was it not?

A: That's right.

Q: You were telling them that if they didn't mind, to please assist you in the search of the vehicle.

A: That's right.

Q: But when it came to the seizures, you actually did the seizures.

A: That's right.

Q: You actually took the two roaches, right?

A: Yes, sir.

Q: Now, I assume after you searched the interior of the car that you go back and you start working on the trunk.

A: That's right.

Q: Now, is the suitcase still in the trunk or had you already taken it out and put it —

A: Everything is left like it — as it when we first —

Q: You got the trunk open and the suitcase is in there.

A: That's right.

Q: We're going to start from the trunk and go back, all right?

A: Right.

Q: Did you take the suitcase out of the trunk?

A: At that time, no.

Q: I'm talking about now we've searched the passenger —

A: Oh, yes,

Q: That was a bad question on my part.

Your searched the passenger area and now you're going back to the trunk —

A: Right.

Q: — which is standing open.

A: Right.

Q: And you see a suitcase.

A: Right.

Q: Do you remove the suitcase?

A: I do.

Q: You pick it up by the handle and put it on the ground.

A: I did, the handle and from the sides, the body of the suitcase —

Q: Was it heavy?

A: Somewhat.

Q: Did you think it was unusually heavy based on the size of the suitcase and what you might expect to feel when you picked up the suitcase?

A: Based on that and also that Mr. Wells had stated he was moving and he had been taking things from Hawthorne to St. Augustine a bit at a time.

So I figured he had — based on my assumption, I was assuming it was just clothes and other stuff.

Q: Did Mr. Wells tell you you were going to find a grey and blue suitcase in the trunk of the car?

A: No, he didn't tell me that.

Q: Did Mr. Wells tell you where he had been keeping the items when he was moving, whether they had been in the trunk versus in the passenger area?

A: Only that he had just been transporting from one place on the other.

Q: Just so I don't get surprised on this, because you're being very straightforward and I have no problem with your testimony, but I don't want to suddenly read the deposition and realize I didn't ask you this question.

Mr. Wells did not indicate to you whether he had been moving items from Hawthorne to St. Augustine and putting the stuff in the back seat as opposed to putting it in the trunk.

Is that fair?

A: He didn't indicate any area.

Q: And did you make any assumptions as to what compartment, if you will, whether it be the passenger area or the trunk, had been used when he said that?

A: No, only that — just transporting —

Q: But he couldn't get in the trunk on the highway.

A: Rights.

Q: And he told you he had been moving.

A: Right.

Q: Did you ask him about: "Well, if you've been moving, how come you can't get in the trunk"?

A: No.

Q: Did he indicate whether he thought there was another key necessary to get into the trunk?

A: No.

Q: Did Mr. Wells give any indication he had ever been in that trunk before?

A: May I say something?

Q: Certainly.

A: When a person is giving me a shoddy story, I let them go ahead and flab off at the mouth and form my own opinions later.

Q: This was a shoddy story.

A: For sure.

Q: When did it get shoddy?

A: When he couldn't open the trunk.

Q: When he couldn't open the trunk?

A: When he couldn't open the trunk and —

Q: What about when you couldn't open the trunk? Was it shoddy then, too?

A: There was still something fishy about it to me, yes.

Q: That's when it got shoddy.

A: Yes.

Q: And he was running off at the mouth.

A: Right.

Q: Tell me all the other things he said when he was running off at the mouth.

A: As far as that goes, nothing but what I've already told you, about how he didn't want me to give him a ticket and —

Q: That wasn't running off at the mouth, was it?

A: To me it was. To me it was sort of like trying to throw me from one thing to the other, from something to — to more or less let him go and forget the whole thing.

To me, that's a shoddy story; you're trying to cover up something.

Q: How many traffic stops have you made since you've been a highway patrolman, roughly?

A: That's a lot.

Q: Any number you feel safe with, minimum and maximum if you want.

Five hundred to five thousand, somewhere in there?

A: We could say over a thousand.

Q: How many times have people asked you to give them a break?

A: Asked me to give them a break?

Q: Yes.

A: Quite often, I would say a third of that.

Q: So over three hundred and thirty-three times you have been asked by someone to give them a break.

A: That's right.

Q: To let you go.

A: That's right.

Q: To let them go, I mean.

A: That's right.

Q: And Trooper Adams, you thought that that was a shoddy story, that they were trying to throw you off each time that occurred?

A: Oh, yes.

Q: So you immediately became suspect of the motives of those three hundred and thirty-three, minimum, people who asked you to give them a break.

A: That's right, because somewhere along further down in their story, they always tell me the truth or they come up and say — they more or less come back and they retract and mess themselves up by saying something out of the ordinary.

Q: And an example of that would be the fact that Mr. Wells had a suspended driver's license, he thought, and that's the reason he wanted you to give him a break.

A: That's right.

Q: But Trooper Adams, I haven't said anything — or heard anything that indicates that when he asked you to give him a break, he gave you a reason why he wanted the break.

Did he give you a reason or did he just say: "Hey, give me a break"?

A: His reason for wanting to give him the break is, one, suspect of his license being suspended —

Q: No, no, what I mean is this.

When he said: "Hey, how about giving me a break," did he give you a reason why he wanted the break at that moment?

A: Not at that moment. Up until the point that he said he thought his license was suspended —

Q: He was just pleading for mercy.

A: More or less.

Q: Which is what happens about a third of the time.

A: That's right.

Q: And does it usually turn out to be that they have license problems is the reason they want a break?

A: Either that or they want the points withheld for speeding or something like that.

Q: Or they're worried about their insurance getting increased.

A: That's right.

Q: So when you say a shoddy story, you mean that they're asking you for a break but they don't really tell you why they want the break, and you're kind of curious about why they want the break.

A: Exactly.

Q: Now once Martin Wells told you that his license was suspended, did you feel like at that point the mystery was pretty well over as to why he wanted the break, at that point?

A: At that point?

Q: I'm talking about before the money.

A: Yes.

Q: When someone asks you to give them a break on a speeding ticket, you don't suspect that they might be DWI as well and they're trying to throw off — throw you off on that direction.

A: No.

Q: Do you-all have videotape machines?

A: Not here.

Q: What machine do you use for the Breathalyzer?

A: BAC Verifier.

Q: Does that have a number? Is that a 2000?

A: It doesn't have a number.

Q: As we sit here now, Trooper Adams, do you consider it to be significant that Martin Wells, and I'm going to use your terms, changed his story about the money?

A: I do.

Q: In your training, have you ever had anyone suggest to you that those things that you think are significant in a case should go into your report?

A: Yes.

Q: How much money did Martin Wells tell you was in the pile?

A: He told me two thousand was in it.

Q: When did he tell you that?

A: While we were riding back to the station.

Q: So Martin Wells has originally told you that he sold a car and that money was his and he hadn't had a chance to put it up.

A: Right.

Q: Then he says that it's not his money and he didn't know it was there.

A: Right.

Q: And then later on on the way back he tells you it's two thousand instead of three thousand.

A: That's right.

Q: Right?

A: Not only does he tell me it's two thousand and not three, because I didn't realize it was three until I counted it, and I miscounted it.

Then I had it recounted again by —

Q: When you miscounted it, how much was it?

A: Two thousand eight hundred, and I recounted it, had one of the jailers to recount it, and they counted it twice and came up with three thousand.

Q: Now, you said not only did he tell you —

A: Not only did he tell me that it was only two thousand, he also wanted me to let him keep a thousand and not report it, which I told him I couldn't do that.

Q: Did he indicate why?

A: He said for tax purposes.

MS. SULLIVAN: To pay his lawyer.

BY MR. JOHNSON:

Q: For tax purposes?

A: You figure that one out; I don't know.

Q: For tax purposes he wanted you to let him keep a thousand.

A: That's right.

Q: That's pretty —

A: "We'll do some under-the-table dealing," is what he said.

Q: He said —

A: "Let's do a little under-the-table dealing, that's what they do."

Q: That they sometimes take cash and don't report all of it.

A: More or less.

Q: I heard that lawyers do that sometimes too,

A: That's your profession.

Q: Oh, stop it.

Well, that's pretty significant, that he asked you to withhold a thousand dollars because they do some under-the-table dealings, isn't it?

A: I guess.

Q: Well, do you consider that significant?

A: If you're dealing in cars I guess it would be.

Q: You didn't make a note of that in your report, did you?

A: No. I take everything into account. If it's trivial or I feel like it's going to be really substantial to the case, I note it, but at the point in time that he made it, it just seemed like something that wasn't necessary.

Q: I'm a little off on comprehending what you meant by that.

At the point in time when?

A: At the point in time then. As you're asking me now, you're making it appear to seem that it was more important

and would be more valuable to you in this case than what I thought at the time.

Q: And at the time that you typed this report —

A: It was just a —

Q: Just a minute, let me finish the question.

A: Okay.

Q: At the time that you typed this report, you had already gone out and inventoried that car.

A: That's right.

Q: And you knew that there was eighteen pounds of marijuana in the trunk of that car when you wrote this report.

A: That's right.

Q: And when you wrote this report, you put in what you considered to be the important testimony that had been given — or statements that had been given by the Defendant; is that correct?

A: This is what transpired, yes.

Q: Do you-all have a provision for filing supplemental reports with the Florida Highway Patrol?

A: If need be, yes.

Q: Have you ever done that?

A: On request if need be, yes.

Q: Only on request have you done a supplemental report.

A: Or if it's something that's following up to a case that has to be supplemented, I do do them.

Q: Well, can you use a supplemental report to put in additional facts that you think are important once you find out additional facts about the case?

A: That's what it's for.

Q: Can you remember anything else that Martin Wells said to you?

A: No.

Q: How did you get into the suitcase?

A: We used a couple of knives.

Q: Okay.

A: It was a combination lock on the suitcase, and what we did was slide a larger knife up the side to slightly pry it and then use a smaller knife to actually — I guess it tripped the lock on it.

Q: Have you over heard the phrase expectation of privacy?

A: No.

Q: Have you ever used a search warrant?

A: Have I used one?

Q: Have you ever applied for a search warrant?

A: No.

Q: Can you think of a set of circumstances under which you might apply for a search warrant when it involves a vehicle?

A: Well, at this time I thought that would be appropriate — a search warrant would be appropriate, but based on what we had and it was part of the search — I figured it was part of the search, I didn't see where it need be.

Q: You figured it was part of the inventory search.

A: That's right.

Q: Did you ask anybody else's opinion before you made that decision?

A: No, only after.

Q: Only after you had already not gotten the search warrant did you ask someone's opinion, and then whatever that opinion was really isn't important, but you did ask after you found the marijuana: "Hey, do you guys think I should have gotten a search warrant?"

A: That's right.

Q: When did it first occur to you that maybe a search warrant would be appropriate?

A: While I was doing the search, but like I said, I felt like opening the suitcase would come under the inventory search of the vehicle.

Q: Even though it was locked and you had to use knives to pry it open.

A: Well, I had to take my chances.

Q: Well, in your experience, if something is locked, does that indicate that someone probably does not want other people in it?

A: That's a strong possibility.

Q: If you lock something, you don't want other people to get in it unless they have the key or the combination, right?

A: That's right.

Q: Now, did Martin Wells make any other statements to you — have you read this statement?

A: Whose, mine?

Q: Yours.

A: I've got mine.

Q: If you could read over it again because what I really don't want to have happen to me is us take this deposition and then you remember some other statements which aren't noted in here.

Is there anything else that Martin Wells said to you other than what I have asked you about today and what appears in your written statement?

A: Nothing that would be worth putting on record.

Q: Okay.

All we did was talk about — I told him I wanted a car and he said where to go get it, and that's about it.

Q: Did he suggest that you use his outfit?

A: He did, come to think of it.

Q: Did he try and bribe you?

A: No.

Q: So when he said could he keep a thousand for tax purposes, he wasn't in any way suggesting he wanted to share that money with you.

A: No.

Q: He wasn't trying to buy your help in any way.

A: No, sir.

Q: At any point did Martin Wells' demeanor change as far as his concern over what was happening? Did he seem to get suddenly more or else scared or more or less uptight?

A: Cool, calm, collected the whole while.

Q: Now, you get down to the station, you fill out the back of the AIR there before the Breathalyzer, is that correct, or do you do the Breathalyzer—

A: This is after —

Q: The Breathalyzer is first.

A: The Breathalyzer and then the report.

Q: And then after the Breathalyzer, you sit down and fill out the front of the AIR.

A: No.

Q: Give it to me chronologically.

A: The front first —

Q: When you first get to the station.

A: That's right.

Q: Then the Breathalyzer.

A: Then your Breathalyzer, then you fill out the back.

Q: And then you read him his rights?

A: That's right.

Q: And you read him his rights after he gives you the information that's on the back of the AIR.

A: No, this is before. You read the rights before. No questions asked until the rights have been read.

Q: I'm trying to get the chronology. I'm not trying to create it, I just want to —

A: Go ahead.

Q: You get down to the station, you fill out the front of the AIR, and you're filling that out based on what you saw happen out on the highway.

A: That's right.

Q: Then after you do that, you read him his rights — or he takes the Breathalyzer.

A: Takes the Breathalyzer.

Q: Then the rights and then the back.

A: Right.

Q: Did Martin Wells make any statements to you after he was read his rights.

A: None.

Q: As a matter of fact, after he was read his rights, did he say that he did not want to make any statements?

A: I think I recall him saying that.

Q: That he chose to exercise his right not to make any statements.

A: Not to say anything.

Q: And that was before you-all had discovered the marijuana?

A: Right.

Q: He exercised that right before that.

A: That's right.

Q: So the first time you apprised him of that right, he exercised it immediately; is that right?

A: That's right.

Q: Without hesitation.

A: That's right.

Q: Did you go back down and see Martin after you found the eighteen pounds?

A: I sure did.

Q: Did you ask him if he wanted to make a statement then?

A: I told him: "I've already advised you of your rights. If there is anybody in cahoots with you and you feel like you don't want to take the rap alone, you can exercise your right to not say anything or you can tell me what you know."

He said, "I don't want to say anything." And that was it.

Q: All right.

A: See, we're on a first name basis now, he's Martin and I'm Rodney. That's just how —

Q: Rodney, I'm Huntley, all right?

A: Okay.

Q: Rodney, can you give me any indication of Martin's reactions when you told him that there was eighteen pounds of marijuana in that suitcase?

A: Cool, calm, collected, nonchalant. It's eighteen pounds, eighteen pounds, that's it, no problem, where it came from —

Q: Wait a minute, lighten up now.

You're saying what it seemed like. He didn't say: Eighteen pounds, no problem."

A: He didn't say anything.

Q: Okay.

A: I mean like: No big deal, it's there, that's it. That was his reaction, his facial expression.

Q: I've known Martin a long time and I've never seen him do anything other than that facial expression. He is always like that, no matter what, but that's not evidence, I'm not testifying.

Do you recall, in Martin's presence, asking any other law enforcement officers if they felt like the car should be inventoried?

A: I did.

Q: Where was that and who was present?

A: Larry McKenzie was the person that I asked. He then told me to refer to the corporal that was on duty at the time, which I did, and he told me to go ahead, if I thought the guy was DUI, take him in for DUI, have the car impounded, and he said, and I quote —

Q: CYA.

A: No. And I quote: "Anybody can have three thousand dollars on the floor of their car."

Q: Who said that?

A: That was from my corporal, and from there I took it upon myself to go ahead and have the car towed, and I did.

Q: In other words, the corporal didn't think it was that weird to see three thousand dollars on the floor of the car, right?

A: Right.

Q: But you did.

A: Oh, yes.

Q: Now Rodney, at some point it flickers through your mind that there may be controlled substances involved in this case.

Is that a fair statement?

A: No, it's not a fair statement because I'm only basing it on what I see and what I have there at the time, and the thought of dealing in marijuana, only a slight flash, but other than that, it's not a factor — it's not a major factor in it.

Q: So when you got out to K and S to inventory the car, at that point it was still a slight factor in our mind?

A: Up until the time I found the roaches in the ashtray.

Q: That led you to believe there would be eighteen pounds or more — there would be substantial marijuana in the trunk?

A: There would be a possibility there might be some more in the car.

Q: But you were still not overly concerned about it.

A: No, only that possibly if I would find some, it would be, say, only something like a nickel bag or something.

Q: So you thought when you went into that suitcase that you might find a nickel bag in the suitcase.

A: Or inside the car somewhere.

Q: Or inside the car.

A: Right.

Q: So it came as a surprise to you to find the amount of marijuana that you did.

A: Totally.

Q: Did you ever have any indication what was inside the suitcase before the actual top was popped on the suitcase?

A: As far as was there an odor?

Q: No, as far as could you see inside of it in any way?

A: No, no.

Q: So when you opened the suitcase — when the top popped off, that's the first time you knew that there was black plastic in there; is that correct?

A: Black plastic and the smell.

Q: Listen to my question.

A: I understand your question.

Q: My question is the first time that you had any inclination or inkling that there was black plastic around the marijuana was when the top actually popped open; is that correct?

A: That's right.

Q: And the smell at that point became overt, shall we say, obvious.

A: That's right.

Q: Now, did anybody stick his nose down and try to sniff the edges of the suitcase before you guys popped it open?

A: No.

Q: Did anybody try and pry open to see what was in the suitcase before the top popped off?

A: We did.

Q: And what did you see?

A: Just the darkness of the bag.

Q: You couldn't tell it was black plastic.

A: No, just — it could have been anything from being dark — late at night in a suitcase, dark inside.

Q: Did you ever ask Martin if he knew it was in the trunk?

A: He said — I asked him if there was anything in the trunk, and he said: "I don't know and I can't open it," and he tried and he couldn't at the time.

I can't recall if I asked him if he knew what was in the trunk once I got back to the Sheriff's department or not.

Q: Now, Rodney, that answer itself because he refused to talk to you at that point.

A: That's what I was just fixing to say.

Q: So you can recall that he did not indicate one way or the other about that.

A: That he know.

Q: He did not indicate knowledge at any time about that suitcase, correct?

A: That's right.

Q: As a matter of fact, he specifically told you he did not know it was in the trunk because he couldn't get in it.

A: That's right.

Q: And then proceeded to try to get in it and could not get in it; is that correct?

A: That's right.

Q: Did Martin give you permission to go into the trunk of that car?

A: Oh, yes, no problem, but he said — I said: "Do you mind if I look in your trunk," and he said, "Sure, go right ahead."

Q: This was out at the roadside?

A: Right, and he went and got the key and stuck it in and he couldn't open it.

Q: And then he even gave you the key to try and open it.

A: Right.

Q: Now, since Martin had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?"

A: No, I didn't.

Q: Did you ever indicate to Martin that you were going to get in the trunk one way or the other, whether the key worked or not?

A: I did. I told him that if we couldn't open it with the key, that we may have to pop it.

Q: And —

A: Pop the trunk.

Q: And he said?

A: That was okay.

Q: He said that was fine, too, that you had to do what you had to do, right?

A: That's right.

Q: Well, did Martin express any concern about damaging the trunk if you had to pop it?

A: No.

Q: I honestly don't know what you have to do.

What would it entail to pop a trunk if you don't have a key?

A: More than likely, just stick a crowbar under there and pry.

Q: Have you done that?

A: Have I, personally?

Q: Yes.

A: No.

Q: Have you ever had a car towed and thereby put into the K and S, or any other place around his yard, that you did not inventory?

A: No, not I.

Q: Anytime you have one towed, you have inventoried the car.

A: I have to.

Q: Stem to stern.

A: That's right.

Q: And you have never had to pop a trunk, you've always had the key; is that correct?

A: That's right.

Q: Have you ever gone into a suitcase that was locked before in any other search that you've ever done?

A: I don't recall suitcases being in it, so no.

Q: At any point, Rodney, did you become concerned about fingerprints in this case?

A: Did I; yes.

Q: When?

A: After we got the marijuana back down there and —

Q: Back down?

A: To the sheriff's department. Deputy Cobb came down and he asked me what did I want to do with it, and I told him.

He said: "We need to go ahead and get the fingerprints," and I said: "That's true," and he said: "Well, what do you want to do? How do you want to do it?"

I said: "Go ahead and call one of your guys that is over the property room," which would have been David.

David came down and said he wanted to take the prints of everybody that had something to do with it, that had come in contact with the suitcase.

Q: But he didn't do that though, did he?

A: David?

Q: Yes.

A: As far as I know he did.

Q: Oh, really?

A: That was there at the time.

MS. SULLIVAN: Is that David Stout, just for the record?

THE WITNESS: Right, David Stout.

BY MR. JOHNSON:

Q: What about the two guys at K and S?

A: He didn't get those.

Q: Okay.

A: On the lab report we did get some unidentified fingerprints.

Q: I know, but you and I would agree that Hoss and William handled the suitcase.

A: They did.

Q: I mean like they were sticking knives in it and holding part of the suitcase and moving their hands and had their hands all over that suitcase.

A: That's right.

Q: And you had your hands all over the combination and all over the handle, right?

A: Right.

Q: And equally tainted, if you will, or touched by others once there was a crime scene developed, was the trunk area.

A: That's right.

Q: Now, were any fingerprints attempted to be lifted from anywhere inside the trunk, inside the trunk?

A: No. The only prints that might have been in the trunk would have been mine.

Q: Or anybody else that had been in the trunk.

A: Right, but what I'm saying is it's not the wrecker drivers.

Q: Well, you searched the entirety of the trunk right?

A: Right, I did.

Q: You only.

A: Right.

Q: And you're just as sure about that as you are the rest of your testimony; is that correct?

A: That's right.

Q: Now, what about the inside of the passenger area?

A: There the wrecker drivers and myself, also, would have fingerprints inside.

Q: So the wrecker drivers did not, in any way, search inside the trunk.

A: I did the search of the trunk and took the suitcase out.

Q: That's not responsive to my question.

I'm trying to have you eliminate them completely.

A: Right.

Q: They did not go into the trunk.

A: Right, I did.

Q: Now, what did Joe Cobb touch, the suitcase?

A: The suitcase, the wrapping around the marijuana.

Q: There's a green plastic bag and a black plastic bag.

The marijuana is in one bag and then that bag is in another bag; is that what happens?

A: It's in one or two trash bags and it was — one was black, I'm sure of, and then there was a heavy-duty cellophane, clear plastic around it.

Q: Which one did you tear open?

A: The black one.

Q: So you opened up the clear one and then you tore open the black one?

A: The clear is underneath the black.

Q: Okay.

A: I tore open the black and there's the clear.

Q: You tore open the black and then the clear was underneath and around the marijuana.

A: Right.

Q: Did you tear open the clear?

A: No.

Q: Now, I asked you originally that at some point you became concerned about fingerprints, and you told me about the fact that Joe said: "Hey, we need to get some fingerprints."

A: That's right.

Q: Is that when you became concerned about it for the first time?

A: No, I already knew that we had to get the prints, but at the time who we had to take the prints, I didn't figure we had anybody to do it.

So Joe asked me if he — if we wanted to use David, and we called Davis Stout.

Q: And he lifted the prints?

A: Right.

Q: Did either of the wrecker drivers handle the marijuana?

A: No.

Q: The container?

A: No.

Q: Never touched the plastic bag?

A: No.

Q: Tim Brown handled the plastic bag.

A: So it says.

Q: Joe Cobb handled the plastic bag.

A: He did.

Q: Did David Stout handle the plastic bag?

A: I would imagine.

Q: Did McKenzie ever come down and take a look at it?

A: No.

Q: Who made the decision as to what was going to be printed in this case?

A: Printed as far as —

Q: Well, in the lab report, Rodney, two things were submitted, as near as I can tell, for prints, and that's one-two and one-three, which is the clear plastic bag and the green plastic bag.

Do you know who made the decision that those would be the two things that would be processed for prints to see if prints could be taken off of them?

A: I did along with the response from the deputy and from David Stout, himself.

Q: The suitcase was not printed.

A: It was supposed to have been.

Q: Did you see David try to lift prints off the suitcase?

A: No, I didn't.

Q: You weren't there when David was lifting the prints.

A: When he lifted the prints, no.

Q: Did you ask Martin why he was speeding?

A: I did.

Q: What did he say?

A: He said he was tired, he was just trying to get home.

MR. JOHNSON: I have no further question.

CROSS EXAMINATION BY MS. SULLIVAN:

Q: Trooper Adams, when did you first learn — when did you learn that there was two thousand dollars in cash in the front seat of the driver's side of the 1977 BMW that the Defendant was driving?

A: When he asked me to go back to get his jacket out of the car.

Q: That's when you first saw the money, correct?

A: Right.

Q: When did you first find out that the quantity of money was two thousand dollars?

A: This was after I got back to the station, because what I was going to do was just hold it and give it to the jailers down at the sheriff's department and they would hold it as his property, and what I had to do was make sure that it was the amount of money that he was telling me.

Q: Maybe I'm not making myself clear.

You said that he had first told you there was two thousand dollars and then he recanted his story and said that there was three thousand dollars and asked you if he could keep a thousand for tax —

MR. JOHNSON: Objection. I don't believe that's what the record will reflect as his testimony.

MS. SULLIVAN: Objection is noted.

MR. JOHNSON: I understand that, but I feel like I better make that one to preserve it.

BY MS. SULLIVAN:

Q: You follow me?

A: Right.

Q: When did he first tell you that there was two thousand dollars in money there, or did he ever tell you that?

A: When we were riding back to the station is when he told me it was two.

Q: And then how long after that did he tell you there was three thousand and could he keep one thousand?

A: Well, he didn't tell me that.

Q: He didn't tell you that.

A: No.

Q: How did you ascertain that there was three thousand?

A: Like I say, when I was getting ready to — before I took his property down to the sheriff department. I counted the money myself and I came up two hundred short, and then once we got to the sheriff's department two or the jailers recounted the money to come up to the three thousand.

At that point of riding along in the car, that's when I found out it was two, and at the sheriff's department is when I found out it was three.

Q: And when does the whole thousand-dollar deal come in about him wanting to keep a thousand dollars?

A: This is when we were riding along.

Q: Okay.

A: As a matter of fact, he actually had the thousand in his hand to keep.

Q: He had it in his hand to keep?

A: Right. He had gotten a thousand under the seat — I had it in the seat and he just picked up a thousand to keep, and when I got to the station I took it all back from him.

MR. JOHNSON: They were on a first name basis at that point.

BY MS. SULLIVAN:

Q: What were the two stories that he gave you about the car when you first stopped him?

A: As far as the — his trying to sell the car?

Q: Yes.

A: That he was trying to sell the car — the car he was driving, right?

Q: Yes.

A: That he was trying to sell the car — or he had made a deal to sell the car, that it was his friend Joe Turner, it was his car, and they had — he had left it with him to keep to try to sell for him.

Q: Is that story number one?

A: That's both of them.

Q: Where is the distinction between them? He was trying to sell the car was one.

A: Right.

Q: And the other one was that it was his friend's car and he was trying to sell it for him?

A: Right.

Q: So the difference was as to who owned the car?

A: Who owns it.

Q: And which story came first?

A: That they were trying to sell it and — no, that it belonged to Joe and that they were trying to sell it; the friend then the selling.

Q: And did the Defendant make any other statements to you that you would deem inculpatory that would point to his guilt, in your opinion?

A: No, none that I can think of.

MS. SULLIVAN: I don't have any other questions

REDIRECT EXAMINATION BY MR. JOHNSON:

Q: Well, do you anticipate that you might think of some between now and the trial in this cause, Rodney?

A: No.

Q: All right.

A: This one I've been contemplating for a long time.

Q: So you've given this deposition a lot of thought before you came in here today?

A: Oh, yes.

Q: And you have read your reports.

A: Read them over and — I take this one out and look at it from time to time.

Q: And you feel like you're thoroughly prepared for this deposition; is that correct?

A: Yes.

MR. JOHNSON: Nothing further.

(Thereupon, the witness was excused and the deposition adjourned).

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby certify that the witness:

RODNEY ADAMS

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was re-

ported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 83 inclusive. constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 3:00 p.m. on June 4, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 14th day of June, 1985.

/s/ Mary E. Bass

MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
My Commission Expires July 23, 1988
Bonded Thru Troy Fain Insurance Co.

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM, COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

DEPOSITION OF KEITH REDDICK

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Palatka, Florida, commencing at 1:50 p.m. on Friday, June 7, 1985.

APPEARANCES:

HUNTLEY JOHNSON, Esquire
Post Office Box 1322
Gainesville, Florida
of counsel for Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida
of counsel for the State of Florida.

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STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

The reading and signing of the deposition by the witness is waived.

All objections, except as to the form of the questions, be reserved until hearing on same or until trial.

Thereupon,

KEITH REDDICK,

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: State your name, sir.

A: Keith Reddick.

Q: Occupation and length of service?

A: Deputy Sheriff with the Putnam County Sheriff's Office. I've been with them since August of last year, 1984.

Q: Are you familiar with the case of the State of Florida versus Martin Wells?

A: Yes, sir.

Q: I understand on the evening, that Mr. Wells was charged with violating the statutes of Florida that you were a backup officer on that case; is that correct?

A: Yes, sir.

Q: I understand you went to the scene for about five minutes?

A: Five to ten, I can't say.

Q: And you observed some money.

A: Yes, sir.

Q: Where was this money — U..S. currency?

A: From what I could tell, yes, sir.

Q: Where was it located?

A: Under the driver's seat.

Q: We're talking about a gray BMW?

A: Yes.

Q: The car that Martin Wells was supposed to have been in.

A: Yes, sir.

Q: The money was sticking out how far?

A: Well, it was — like I said, it was not in bundles, it was more or less like in broken packs or whatever. It was — you know, part of it was sticking out two-thirds of the way. You could tell that they were — there was quite a large amount of bills under there.

Q: So the farthest any of the bills were sticking out was two-thirds of the exposure of the bill, roughly?

A: Roughly, sir, I'm not really sure.

Q: And there was more money farther up underneath there?

A: I don't know, sir, I didn't get down and look.

Q: You say the door was open when you observed it?

A: If I remember correctly. Like I said, I got there to make sure — when I heard the trooper was calling for help. I thought he was in, you know, a physical problem, had someone trying to harm him. That's my main concern when I heard his backup, because when I arrived, three other officers arrived, also.

So I —

Q: You did not observe from outside the car with a flashlight being flashed in on the floor, in other words.

A: No, sir.

Q: Is that the extent of what you know about this case?

A: Yes, sir, because after I found out Trooper Adams was not being harmed in any way, it was time for me to go on. So I went ahead and left and left it in their hands.

Q: Did you get in any conversation about how this must be a dope case because there was that money?

A: No, sir. Like I said -

Q: No follow-up investigation?

A: No, I had nothing else to do with it.

MR. JOHNSON: No further questions.

MS. SULLIVAN: No questions.

(Thereupon, the witness was excused).

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby certify that the witness:

KEITH REDDICK

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was reported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 5 inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 1:50 p.m. on June 7, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 10th day of June, 1985.

/s/ Mary E. Bass
MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
My Commission Expires July 23, 1988
Bonded Thru Troy Fain Insurance, Inc.

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

DEPOSITION OF LARRY McKENZIE

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Palatka, Florida, commencing at 3:15 p.m. on Friday, June 7, 1985.

APPEARANCES:

HUNTLEY JOHNSON, Esquire
Post Office Box 1322
Gainesville, Florida
of counsel for Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida
of counsel for the State of Florida

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STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

The reading and signing of the deposition by the witness is waived.

All objections, except as to the form of the question, be reserved until hearing on same or until trial.

Thereupon,

LARRY McKENZIE

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: State your name, please, sir.

A: Larry McKenzie.

Q: Trooper McKenzie, I understand that you were called to the scene of the arrest of Martin Wells in a backup capacity when Martin Wells was arrested in his gray BMW back in February.

Do you recall that incident?

A: Yes, sir, I do, but the BMW wasn't gray, it was yellow.

Q: Yellow?

A: Yes.

Q: I haven't see the car.

Well, in that case, what year was it?

A: It wasn't my case, I was just a backup unit, I was just backup for him.

Q: You were called out on a routine backup status?

A: Well, basically he wanted some general information, he wanted another officer's opinion.

Q: Was this before or after he found the money that you were called; do you know?

A: This is after, I think, because he told me when I arrived at the scene that he had the money.

Q: Was that the first communication you had with Trooper Adams, when you arrived at the scene? You did not talk to him on the radio before you got there?

A: No, sir.

Q: Can you just tell me in your own words, Officer, what happened once you got to the scene.

A: Once I got to the scene —

Q: Where was the Defendant, first of all, when you got there?

A: On the right side of the car, the right rear of it.

Q: The right rear of the BMW?

A: The BMW, and also Trooper Adams was back there, too.

Q: Go ahead.

A: I went ten ninety-seven, which means you arrived at the scene, and I got out of the vehicle — well, when I was en route, I was on this side of the river and there was a deputy — I picked another deputy up in front of me, which is the intersection of 207 and 15 over there, which is State Road 17 and I followed him out there.

Q: The deputy was en route to the scene as well?

A: Yes, sir.

Q: His name was?

A: I don't know which one is was.

Q: Could it have been Reddick?

A: It's a possibility. There were two or three deputies out there. I remember seeing Keith Reddick out there.

Q: Who else did you see out there?

A: I won't swear to it, but I believe it was Rick Semond.

Q: Rick Semond?

A: I think it was. I won't swear who it was but —

Q: Do you recall any others?

A: There was another one but I didn't see him, it was dark.

Q: Okay.

A: Anyhow, I went ten ninety-seven, told the station I was ten ninety-seven, which means you arrived at the scene, and I got out of the car and called Rodney over to the side and asked him what the problem was.

Q: And he said?

A: Well, he said he stopped this vehicle for unlawful speed, and upon — the individual has been drinking, he smelled alcohol on him, and he had got approximately two thousand dollars.

Q: Did he, meaning Trooper Adams, tell you that he had already given the field sobriety tests to the Defendant?

A: No, he didn't tell me that.

Q: Did he say whether the Defendant was under arrest?

A: He didn't say.

Q: Did you ever advise the Defendant of his rights?

A: No sir, I didn't, because I wasn't the arresting officer.

Q: I understand that, I'm just crossing my T's and dotting my I's.

A: Good.

Q: What was the problem?

A: What do you mean?

Q: That the trooper needed advice about.

A: Well, he asked me about what the procedures of doing with that money, and I told him that in my opinion, I would turn the money over to the sheriff's department and get a receipt for it, but I was not the supervisor and I advised him to call the supervisor and let him tell him what to do with it.

So he called St. Augustine and got ahold of Buddy Tillman, and Buddy Tillman told him basically the same thing I told him.

Q: Earlier before the deposition, Trooper, I asked you if Buddy Tillman was the supervisor on duty that night.

Have you been able to ascertain since then that he was or is that just your best guess as we sit here now?

A: He was the supervisor that evening, yes.

Q: Have you discussed this case with Buddy Tillman at all?

A: No sir, other than: "I heard you were involved in something," and I said: "I didn't know anything about it. All I know is he had a speeder out there was involved in a DUI."

Q: Did Trooper Adams ask you your opinion concerning the way he should handle having the vehicle impounded?

A: What do you mean?

Q: Well, did Trooper Adams ask you if you thought it was necessary for him, meaning Trooper Adams, to do an inventory search of the vehicle after it was impounded?

A: That's policy, that's FHP policy. Once you apprehend a subject like that, that's FHP policy to take an inventory search of the vehicle.

The man — he done found two thousand dollars. As far as he knows, it could have been fifty thousand dollars, and he had to take an inventory search right there.

You come up and the man comes back and says where his car is, and he had got two thousand dollars, and he says: "Where's my fifty thousand dollars?" What you going to tell him?

Q: I'm not questioning the reason for the policy, I asked you a question if Trooper Adams had asked you anything about that policy.

My experience has been that the younger inexperienced officer, sometimes he's not as familiar with policy as troopers who have had more experience.

So my question was, simply, regardless of the fact it's policy or SOP, which I understand that it is, inventory a vehicle, do you recall if Trooper Adams asked you anything at all about that policy that night?

A: I don't recall at this time.

Q: Now, I assume that you did not make out a report in this case; is that correct?

A: Not me, because I was just a backup officer, I wasn't the arresting officer.

Q: Right.

You have stated two thousand dollars was the sum.

A: That was approximated. I found out later on — Trooper Adams called a wrecker out there to come impound the car, and I knew by then that he going ahead and run the Breathalyzer on him, so I advised Rodney that if he wanted me to, I'd stand by until the wrecker driver come out there with the car.

Q: Which you did.

A: Yes, sir, and Rodney took him to the station and I stood by until the wrecker driver come out there, which was K and S, and it was Clint —

Q: Also known as Hoss, right?

A: I don't know.

Q: Big fellow.

A: Big fat fellow.

Q: Okay.

A: Sloppy-looking fellow.

Q: His shirttail doesn't come all the way down to his belt.

A: Whatever, about this big around (indicating).

Anyhow, once I cleared that, I went to the station to see how Rodney was doing and checked on him, and when I came into the station he advised me that instead of two thousand dollars, it was — he had counted it and it was three thousand.

Q: What I'm interested in is do you have a clear recollection, Trooper, that someone told you the figure two thousand and that you might now be mistaken that it was three thousand?

I'm just wondering how certain you are that it was two thousand.

A: Well, Rodney told me at the scene it was two thousand.

Q: He told you it was two thousand.

A: At the scene.

Q: Okay.

A: And then when I got back to the station —

Q: It was changed to three.

A: He counted it out and it was three thousand.

Q: Did Rodney indicate to you how he came to rely on the figure of two thousand?

A: No, sir, not as I recall.

Q: Have you —

A: It's been what, two or three months?

Q: Have you done any backup investigation on this case?

A: Not me, it's not by case, I was just responding to an officer for a backup.

Q: According to the way you-all do it at the particular unit you're stationed with here in Palatka, if there was going to be backup investigations done on a follow-up investigation, if you will, would Sergeant Campbell be one of the people that would do that?

A: He's the supervisor over Buddy Tillman, but what investigation are you talking about now?

Q: Specifically, it's my understanding that Sergeant Campbell has attempted to get in touch with the fellow who owns the car, a guy named Joe Turner.

I would call that a follow-up investigation since there's a discrepancy between who was driving the car and who owned the car, and what I'm asking is — I consider that to be follow-up.

Sergeant Campbell, is that in his job description, to do that type of follow-up?

A: You'd have to ask him that, not me.

Q: Is that the extent of what you know about this case, Trooper?

A: Yes, sir.

Q: Okay.

A: Just go up there for a routine backup and give him my opinion. I told him what I'd do, but in a situation — I told him to check with the supervisor on duty that night, which was Buddy Tillman out of St. Augustine, and Buddy came back and told him basically the same thing I told him.

I walked back to my car and he got all ready with Mr. Wells, your client there, and he called a wrecker out there, and I told him: "I'll stand by since you're going to go ahead

and take him down to the station to run a Breathalyzer test on him."

I stood by out there until K and S arrived, and once he cleared it, I went to the station to see how he was coming along, asked him — I walked into the trooper room and said: "Everything is fine?" And he said: "Yes," but he advised me then that instead of being two thousand dollars, it was three thousand.

Q: Did you give the keys to Clint when he came out to the scene, the keys to the BMW?

A: He took the ignition key, I think it was.

Q: Was there more than one key?

A: I can't recall.

Q: You weren't present when anybody tried to get into the trunk of the car, were out?

A: Yes, sir, I was.

Q: You were present for that.

A: Yes, sir.

Q: Can you tell me what happened?

A: Martin tried first to get into it and he couldn't open it, then Rodney tried it and he couldn't open it, because I was back away then, I was back to my unit, cruiser, whatever you want to call it.

Q: I, during the course of this case, have learned that in order to open a BMW trunk that's locked you have to put the key in, press the button in and then turn the lock to the right before it will take.

In other words, if you don't push in the button when you're trying to turn it, it won't turn until you push the button in.

Were you aware of that prior to that day, that that's the case with those cars?

A: No, sir, I didn't know, because I can't even afford to mess around with them BMW's with what the state pays me.

Q: So Larry, other than simply watching both the Defendant and Trooper Adams trying to get into the trunk, did you observe anything else that we haven't covered here today?

A: No, sir.

Q: Did either Martin or Rodney say anything while they were trying to get into the trunk that you recall them saying?

A: I was too far back to even hear anything.

Q: Okay.

A: You could hear voices, you know, but I didn't — couldn't understand what they were saying.

MR. JOHNSON: I have no further questions.

MS. SULLIVAN: No questions.

(Thereupon, the witness was excused and the deposition adjourned.)

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby certify that the witness:

LARRY McKENZIE

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was reported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 13 inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 3:15 p.m. on June 7, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 10th day of July, 1985.

/s/ Mary E. Bass
MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
My Commission Expires July 23, 1988
Boned Thru Troy Fain Insurance, Inc.

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

DEPOSITION OF JOE COBB

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Palatka, Florida, commencing at 2:00 p.m. on Friday, June 7, 1985.

APPEARANCES

HUNTLEY JOHNSON, Esquire
Post Office Box 1322
Gainesville, Florida
of counsel for Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida
of counsel for the State of Florida

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SWORN TESTIMONY OF: JOE COBB

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Direct Examination by Mr. Johnson 3

STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

The reading and signing of the deposition by the witness is waived.

All objections, except as to the form of the question, be reserved until hearing on same or until trial.

Thereupon,

JOE COBB,

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: State your name, sir.

A: Joe Cobb.

Q: Joe, are you familiar with the State of Florida versus Martin Wells?

A: Just a little bit.

Q: Apparently you came into contact with some of the evidence?

A: Yes.

Q: And that evidence was what?

A: It was a large amount of marijuana and some cash.

Q: Did you handle the cash?

A: Yes, I did.

Q: Did you count the cash?

A: Yes, I did.

Q: And it came out to be three thousand dollars?

A: Yes.

Q: You counted it twice?

A: Two or three times.

Q: Now, did your fingerprints come back on any documents or items that were sent into the FDLE lab?

A: I'm not personally aware if they did or not, but I was told by Deputy Reddick that they did come back on the plastic that was encasing the marijuana.

Q: Supposedly, and I'm quoting from the report, the second paragraph on the second page: "Five latent fingerprints were identified with the known fingerprints of Joe Cobb, two latent fingerprints were identified with the known fingerprints of Rodney Adams."

Now, what bag did you handle?

A: There was plastic, like a garbage bag.

Q: Black or green?

A: It was black, I believe. I wasn't down there very long, but it was encasing the marijuana, and I took the marijuana that was in the bag up to a scale and we weighed it.

Q: Did you touch the clear plastic that was inside?

A: I don't think so, just the dark colored plastic.

Q: From prior testimony, if I might help you for a second here, supposedly the marijuana was encased in clear plastic and then there was a black garbage bag and/or a green garbage bag, one inside the other, but we know for sure in the center there was clear plastic.

A: I remember that, now.

Q: There's also a black one and a green one?

A: Black or green.

Q: All right.

A: A dark color.

Q: We think there may have been two. There's been some confusion about it, as near as I can tell.

Did you handle the clear plastic?

A: I don't think I did.

Q: And —

A: If my fingerprints came back on it, obviously I did, but I don't think I did.

Q: Unfortunately, Joe, to be fair to you, the way this is worded I can't tell if you came back on Exhibit 1 or Exhibit 3.

(Thereupon, an off the record discussion was had; whereupon, the following proceedings were held in the absence of the Assistant State Attorney).

BY MR. JOHNSON:

Q: Who instructed you, Joe — is it all right if I call you Joe?

A: That's fine.

Q: Who instructed you to pick up the marijuana?

A: Nobody instructed me, we just wanted to get it weighed to see how much we were dealing with.

Q: Would it be fair to say that at that point no one in law enforcement, in your presence, had expressed any concern about preservation of fingerprints on that particular bag?

A: Not until David Stout got there.

Q: But you had already weighed it before David Stout got there.

A: Yes.

Q: And I can guess that when David got there, he said: "Don't anybody else handle the evidence."

A: He said: "Let's package this up for fingerprints and let's don't let anyone else touch it when we get here."

Q: And that's when you had the pleasure of telling him that you had already put your prints on it, right?

A: Well, he asked who-all had touched it, and we told him to the best of our knowledge who touched it.

Q: Who all had touched it?

A: Myself, Rodney Adams, and as far as I know, that's all that I saw — that I personally saw touch it.

Q: When you picked it up, did you pick it up by the sides?

A: Yes.

Q: So whichever was the outer bag —

A: I remember it was real thick plastic that was —

Q: In the center.

A: In the center, and if they make a garbage bag, and I think they do, where the side is black and the outside is green —

Q: They do that.

A: That could be what it was, one of those garbage bags.

Q: Because what it is is that some people think there were two bags, because we've got green and black, but I'm also very familiar with the — kind of lawn bag where the inside of it is black and the outside is green.

A: Yes.

Q: Okay.

A: It could have been that or it could have bee two separate bags, but anyway, I don't remember touching the clear part intentionally.

I do remember picking up the marijuana on the outside and carrying it like you would a bale of hay, just like that (demonstrating), and taking it up stairs and weighing it on a scale, then bringing it back downstairs.

Q: So you picked it up twice?

A: Well, I had to set it down on the scales and then pick it back up and take it back downstairs.

Q: And you never, to your knowledge, pushed back the outer bag and touched the clear plastic.

A: Not to my knowledge.

Q: It's a possibility.

A: I very well could have, but not to my knowledge.

Q: You weren't really paying attention as to the way you were handling it, because based on the facts of the case, you weren't overly concerned about fingerprints at that point.

A: Right — well, to be honest with you, I didn't think that they were going to send it off — I didn't know what they were going to do with it, I just — we wanted it weighed, so we took it up and weighed it and brought it back.

Q: Were any of the clear plastic bags open to where you could see the actual marijuana, itself, exposed?

A: No, I don't recall that it was.

Q: Did you ever see anybody taking it out and going: Good stuff, or anything like that?

A: No one did anything like that; in fact, you couldn't hardly smell it, if I remember right, because it was in that real thick plastic. I think that's the reason it was encased in that.

Q: Did you handle the suitcase, too?

A: I don't recall handling the suitcase.

Q: Did you have anything else to do with this case?

A: That's all.

Q: Okay.

A: I'm the one that called David Stout to have him come down here so we could secure the marijuana and the money, and that's about it, and I helped Rodney fill out the evidence receipts.

Q: Did Rodney tell you about the case?

A: No, he just told me that he stopped him for speeding or no tag, I don't remember why he stopped him, and he saw some money, and something about asked him if he could search the vehicle, and found this.

Q: The kid said he could search the vehicle according to Rodney?

A: According to Rodney, I believe he did.

Q: The kid being the Defendant.

A: Whoever he is. I only saw him —

Q: I know, but you're referring to him as "the kid," and my point is the Defendant, just so we're not confused about who "the kid" is.

A: Did I say kid?

(Thereupon, an off the record discussion was had.)

BY MR. JOHNSON:

Q: I thought you did, and I sometime refer to Martin as a kid anyway; the Defendant.

A: The Defendant.

Q: Did he say, he meaning Trooper Adams, say anything about what the Defendant had said to the trooper?

A: No, not — I don't remember anything in particular.

Q: Do you remember anything else about this case whatsoever that you've heard or done? Have I extracted the totality of your knowledge about this case from you at this time?

A: All I did was go down to the booking desk, and when Trooper Adams brought the Defendant in, we went back to the back office — I say the back office, but it's the secretary

of the Detectives Division's office, and we went back there and he sat the suitcase down in a chair back there, or on the floor, and that's when he started doing his paperwork. He was on the phone for a long time with his supervisor.

We wanted it weighed, so I took it up and weighed it, brought it back, and then I counted the cash, he counted the cash, David Stout counted the cash, and I left.

Q: Who is his supervisor?

A: It's a different one every night. I don't know who his supervisor is except I would say Captain Sigmond, but I think he was talking to Sergeant Campbell or — I'll tell you it's one of three people - Sergeant Campbell, Corporal Marty Snow or Corporal Ron Lewis.

Q: Who carried the marijuana from Adams' car into the station?

A: I have no idea.

Q: It was just in the evidence room when you got there?

A: Yes, I believe it was.

MR. JOHNSON: I have no further questions.

(Thereupon, the witness was excused.)

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby ceritfy that the witness:

JOB COBB

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was reported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 11 inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 2:00 p.m. on June 7, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 10th day of July, 1985.

/s/ Mary E. Bass
MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
My Commission Expires July 23, 1989
Bonded Thru Troy Fain Insurance Co.

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

DEPOSITION OF GROVER CLINTON BRYAN

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Palatka, Florida, commencing at 2:05 p.m. on Tuesday, June 4, 1985.

APPEARANCES

HUNTLEY JOHNSON, Esquire
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Gainesville, Florida
of counsel for Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida
of counsel for the State of Florida

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SWORN TESTIMONY OF:
GROVER CLINTON BRYAN

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STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

The reading and signing of the deposition by the witness is waived.

All objections, except as to the form of the question, be reserved until hearing on same or until trial.

Thereupon,

GROVER CLINTON BRYAN,

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: State your name and where you live and where you work, if you will.

A: Grover Clinton Bryan, I live at Route 6, Box 5575, and I work for K and S Automotive here in Palatka.

Q: How long have you been working for them?

A: I've been there a year.

Q: It's my understanding that you worked for another wrecker outfit prior to that?

A: Yes, sir, I worked for Hall's Custom Paint & Body Shop driving a wrecker and doing body work.

Q: For how long?

A: A year.

Q: During the course — so those are the only two times you've worked in the car area?

A: No, sir, I've been working with automobiles all my life.

Q: Give me the whole history.

A: Well, I started out at fourteen years old as a mechanic and worked as a mechanic until about ten years ago. Ten years ago I switched over and went to doing body work along with driving a wrecker, and I've been driving a wrecker for five years now.

Q: How long, all total, in the automobile industry?

A: About sixteen, seventeen years.

Q: So you're like thirty, thirty-one years old now?

A: Thirty-three.

Q: Since fourteen, so has it been nineteen years that —

A: Yes, nineteen.

Q: And you have worked both as a mechanic and on the bodies of automobiles; is that correct?

A: Yes.

Q: I know that over a period of nineteen years it's hard to make a reasonable estimate on something like this, but can you tell me how many BMW's that you have come into contact with in your line of work?

A: Four.

Q: Have you ever owned a BMW?

A: No, sir.

Q: Have you ever had a close friend who did?

A: No, sir.

Q: Now, can you tell me, is there anything unusual about the manner in which the trunk of a BMW opens?

A: A BMW trunk, it has a button and you have to insert the key into the button and push it in and turn it in order for it to open.

If you just insert it in and turn it and don't push the button, it won't open. You can turn it, but it won't open.

Q: Have you ever seen anybody have difficulty with opening a BMW?

A: Oh, yes.

Q: Did you see the trooper, Trooper Adams in this case, try to open the BMW?

A: I didn't see him try.

Q: Did he tell you that he had tried to open it?

A: They told me at the scene where I picked the car up that —

Q: Just a minute, let me warn you about something here.

When you say "they," I'm at a disadvantage because we're dealing with all men in this case, so if you could just name the individuals and tell me which one said what, I would be most appreciative, all right?

A: Okay.

Q. Thank you.

A: Officer Larry McKinnon.

Q: He's with the Sheriff's office.

A: No, he's with the highway patrol.

Q: All right, Larry McKinnon.

A: He was sitting with the car for the arresting officer while I was en route to the car.

Q: If I might, Trooper Adams had already taken the Defendant to jail and Larry McKinnon was sitting there as security on the vehicle; is that right?

A: Yes, sir.

Q: And where was Larry located when you got there?

A: He was sitting behind the car with his lights shining on it.

Q: Who had the keys to the car?

A: Officer McKinnon had them.

Q: When did you find out that he had them, as soon as you got to the scene or later on?

A: When I pulled up there, he got out and handed me the key and told me there were the keys to it.

Q: So at some point did you and Officer McKinnon have a conversation about difficulty in opening the trunk of the car?

A: No, sir.

Q: At some point did you and Trooper Adams have a conversation about that?

A: No sir, we had no conversation, just — I asked if they had inventoried and Trooper McK nnon told me that they had tried to but they couldn't get the trunk open; that was it.

Q: Did he indicate to you what the problem was with getting the trunk open?

A: He didn't indicate, he just said they couldn't get it unlocked.

Q: Hoss, did anybody — were those the only two law enforcement officers you came in contact with that night?

A: Yes.

Q: I have understood your testimony and I'm not trying to belabor the point, but I may say something that might cause something to clock in your memory.

Did anybody say anything about how they didn't think they had the key to the trunk?

A: No, sir, because when I pulled up on the scene, Officer McKinnon came right to the wrecker and handed me the key, which usually if they holding one like that, they usually have the key and they hand them to me when I get to the scene.

Q: But somebody told you, and you're not sure which one it was, or do you remember who it was, that they could not get the trunk open?

A: Officer McKinnon said that Officer Adams had tried to open it but he couldn't get in it.

Q: And he tried to open it with the same key that, in fact, opened it; is that correct?

A: Yes.

Q: And because of your experience with the BMW's that you're familiar with, you're aware of the fact that unless you depress the button and then turn the key, the trunk is not going to open.

A: Yes, sir.

Q: Is that correct?

A: Yes, sir.

Q: Have you ever witnessed, yourself, anybody else having trouble getting into a BMW?

A: I've seen several fellows where I work that couldn't get in them.

Q: And with the proper key.

A: With the proper key.

A: And we're talking about getting in the trunk; is that right?

A: Yes.

Q: Did either one of the law enforcement officers mention in your presence the fact that they knew that the individual arrested that night was not the owner of the car?

A: No, sir, they didn't state that.

Q: Were there any law enforcement officers there when you opened the trunk?

A: Yes, sir, Officer Adams came to our shop on Highway 17 North where I had towed the car to and said that they wanted to inventory further on it.

Q: Adams.

A: Yes.

Q: Did he have McKinnon with him?

A: No, sir.

Q: He was by himself?

A: Yes, sir.

Q: Where was McKinnon now?

A: McKinnon, I have no idea.

Q: He had left?

A: He was gone, he was out of the picture altogether.

Q: So if I get the chronology right, then, McKinnon follows you to the wrecker place?

A: No, he just stayed there on the side of the road until I got hooked to the car.

Q: Okay.

A: When I picked the car up and started down the road with it, McKinnon went on into the highway patrol station.

Q: And that's you-all's standard operating procedure?

A: Yes, that's standard procedure.

Q: Did you stop anywhere on the way in?

A: No, sir.

Q: You get to the shop out on 17, did you say?

A: Yes, sir.

Q: And when you get there, I assume you lower the car.

A: No, I didn't lower it right then. I figured I'd unhook it the next morning because I wasn't looking for any more calls, so I left it hanging on the wrecker, went in and went to bed.

Then our other shop security man come down and said that they wanted to inventory it.

Q: What time did you go to bed?

A: It was around — between twelve-thirty and one o'clock.

Q: And what time did the other shop man come in and get you up?

A: About one-thirty.

Q: Had you been asleep?

A: I had dropped off but I hadn't been asleep long.

Q: The other shop fellow, is he in charge of maintaining security there at night?

A: Yes, we both work security on it.

Q: You both live on the premises.

A: Yes, we both live on the premises.

Q: Do you have any dogs?

A: Yes, we have dogs.

Q: And the vehicle in question, the BMW, was inside a secured fence?

A: Yes, sir.

Q: So to cut all that short, in your opinion, Hoss, was the vehicle secured to the point that no one could have gotten into the trunk while it sat in your —

A: Yes, sir.

Q: Where were the keys while it sat in your yard?

A: In my pocket.

Q: While you were sleeping.

A: In my pants inside the house.

Q: Well, you weren't sleeping in your pants, but they were in —

A: They were in my pocket.

Q: So when you got up at one-thirty, you got them out of your pants pocket and went downstairs.

A: Yes

Q: Now, if you could, with as much detail as you can recall, tell me what occurred between you and Adams, what he said, what you said, what you-all did as a result of the conversation.

A: Officer Adams said he wanted to inventory the car good, he wanted to go through it real good because he felt that there was drugs in it.

So we went through the passenger compartment, and we found nothing but two little stub roaches of marijuana in the ashtray, that was it, and he kept saying there was more somewhere.

Q: Did he say why?

A: And he asked me if I could open the trunk.

Q: Did he say why, Hoss?

A: Well, he felt that the money that they had found was from a drug deal.

Q: What did he tell you about the money he found?

A: He just said that they found three thousand in cash in the floorboard, and he said: "There ain't nobody runs around with that kind of money in the floorboard unless they're dealing drugs or something like that."

Q: Did Adams indicate to you that he had any knowledge as to what the Defendant's occupation was?

A: No, sir.

Q: Have you since learned what the Defendant's occupation was?

A: I have heard. I'm not real positive, but I have heard that he runs an automotive body shop, buy and sell cars.

Q: That their business is buying and selling cars.

A: Yes.

Q: That's correct, that is what they do.

Now, did Adams say anything about the fact that the Defendant produced a document which showed that he had made a transaction for three thousand dollars on an automobile?

A: No, sir.

Q: Adams did not mention that at all?

A: No, sir.

Q: Now, did Adams indicate to you, and I don't mean any disrespect when I call him Adams, Trooper Adams is what I'm saying —

A: Yes.

Q: Did Trooper Adams indicate to you that he had had a conversation with anyone else at the highway patrol station who helped him arrive at the conclusion that there must be drugs in the car somewhere?

A: No, sir.

Q: The two roaches, what did Trooper Adams do with those?

A: He had a yellow envelope, and he put them down in the envelope.

Q: For evidence.

A: For evidence.

Q: Then after you-all have, to the satisfaction of Trooper Adams, searched the inside of the vehicle, the passenger area, Trooper Adams said to you: "Can you get in the trunk?"

Is that what he said?

A: He asked me if I knew how to open the trunk, and I said: "Sure," and I took the key and opened the trunk.

Q: Took the key, you pushed in the button, and then you turned it and opened the trunk, right?

A: Yes.

Q: Did Trooper Adams express —

A: He asked how did I get it open, and I explained to him you had to push the button in.

Q: And did he show surprise at that?

A: He said it was a new one on him, he had never had that problem.

Q: Of pushing in a button on a trunk before you opened it; is that correct?

A: Yes.

Q: And did he then try it himself to see how it worked or —

A: No, the trunk was opened. That was — his concern then was the trunk was open.

Q: Now , when he asked you if you knew how to get into one, did he indicate in any way that if you-all did not have the key to the trunk that he wanted in that trunk anyway?

A: He said that he would hate to have to mess up the trunk lid on it but that he wanted to open that trunk.

Q: He was prepared to mess up the trunk lid if necessary to inventory the car; is that correct?

A: The way he talked, yes, sir.

Q: And he made it clear to you that in his own mind he though there was going to be drugs in that trunk.

A: Yes, sir.

Q: Now, the trunk's up. What happens?

A: There was a big blue suitcase in it. We took the suitcase out, sat it down, and he looked all through the inside of the trunk, under the mat and everything and there was nothing in there.

Then he persisted we needed to open that suitcase and find out what was in it.

Q: Did you ever hear him make any inquiry of any other law enforcement officers on the radio as to whether or not he needed a search warrant?

A: No, sir.

Q: Did he ever mention the word "search warrant" in your presence as to whether he did or did not need one?

A: No, sir.

Q: Not at all.

A: And I felt, you know, that I was just cooperating with the law officer, and so I assisted him —

Q: I've got no problem with what you did.

So he then wanted assistance in opening the suitcase.

A: Yes, sir.

Q: He couldn't get the suitcase open either.

A: No, sir, it had a combination lock, and we worked with it and worked with it, and finally we took out knives and worked along the edges of it and it popped open.

Q: So there's a suitcase in the trunk of the car that's locked.

A: Yes, sir.

Q: And it has a combination lock on it, and you-all start trying various combinations in order to try and open it.

A: Yes, sir.

Q: It won't open, so Trooper Adams says: "I want in the suitcase?"

A: Yes, sir, he said that that suitcase had to be opened.

Q: For purposes of inventorying?

A: He said that he had a strong suspicion there was drugs in that car and it was probably in that suitcase.

Q: And he wanted in the suitcase for that purpose.

A: And he wanted to see in that suitcase to see if there were drugs in it.

Q: Whose knives?

A: Well, I had my knife, and our other man, William Kennedy, had his knife.

Q: Have you got your knife with you now?

A: Yes, sir.

Q: Can I see it?

A: (Showing to counsel)

Q: Go ahead and show me the blade that you used.

A: (Showing to counsel)

Q: William has a knife similar to that?

A: No, he's got a much smaller knife.

Q: Was William assisting in this?

A: Yes, he was.

Q: So William saw and heard everything that you're telling me about; is that right?

A: Yes.

Q: Who was using William's knife?

A: William was using his and I was working mine.

Q: So Trooper Adams stepped back and said: "Hey, fellows, open that up for me."

A: Yes.

Q: So you-all worked the inside where the top of the suitcase would close, you worked along the edges.

A: Yes.

Q: And how long did it take you to get in it?

A: About ten minutes.

Q: The suitcase pops open and then what?

A: Well, the suitcase popped open, and looking down in it, there was a black garbage bag, plastic garbage bag.

Q: Did Adams make any sounds of excitement about that?

A: Yes, he was quite excited. He said: "Thereit is —"

Q: Ha-ha, I'm right.

A: And he opened it up, tore into the bags. There was two bags, one covering the other, and when he tore through the second bag, there was a bale of marijuana, or half a bale, whatever it was.

Q: Is it all right if I call you Hoss?

A: Sure.

Q: Hoss, did Trooper Adams at any time show any interest in you-all being careful about not getting your fingerprints on what might be evidence?

A: No, sir.

Q: Would it be fair to say that you and William had your hands all over the trunk of that car and all over that suitcase?

A: Yes, sir.

Q: Especially the suitcase, right?

A: Right.

Q: Like if you are sitting there for ten minutes —

A: It was hard to handle it, you know, and not have fingerprints all over it.

Q: Are you right-handed or left-handed?

A: I'm left-handed.

Q: So while you're using the knife with your left hand, you're holding the suitcase with your right hand, aren't you?

A. Yes, sir.

Q: And you're moving your hand around on the suitcase while you're prying, right?

A: Oh, yes.

Q: So you're all over that suitcase.

A: Yes, sir.

Q: Did you hold the garbage bags?

A: I never held the garbage bags.

Q: Just Trooper Adams did that.

A: Just Trooper Adams handled the garbage bags.

Q: And he handled them pretty well, didn't he?

A: Yes, he handled them pretty well.

Q: He didn't hold it by a thumb and a fingertip as though he were trying to protect the evidentiary value of it, did he?

A: No.

Q: Okay.

A: He got ahold of the bags and ripped them open.

Q: Trooper Adams saw garbage bags and got excited and grabbed them and started handling them and feeling them and tearing them open, right?

A: He just tore them open. He had a strong suspicion as to what was there.

Q: I think that's because the guy blew a .08, he figured there must be drugs in the trunk.

Hoss, do you have any other information about this case, including hearsay, because right now I can find out about hearsay, and we'll let the judge decide about that later.

Have you heard the troopers talking about this case —

A: Nothing other than they were going to confiscate the car.

Q: No matter what —

A: They —

Q: They were going to get the car.

A: They had plans to confiscate it.

Q: Okay.

A: They come out and asked us about holding the storage off of it if they confiscated it, but our boss lady said no, they were going to pay just like anybody else.

Q: That seems fair since the car is worth about eight thousand dollars.

A: And I heard that they were in the process of confiscation.

Q: Now, did you ever hear anybody express any concern about the fact about the manner in which the trunk and the

suitcase and the bags had been handled as far as evidentiary purposes go?

A: No, sir.

Q: Well, Hoss, as you were standing there watching Trooper Adams handle the thing, did it occur to you that he might be handling evidence and fingerprints might —

A: Well, I figured he was handling evidence, but I didn't know whether fingerprints would make a difference or not, you know, but they —

Q: But they might.

MS. SULLIVAN: That he was caught red-handed.

MR. JOHNSON: Since the lab report reflects that my client's fingerprints are not on either the suitcase or the bag, they might become something of a point of interest later on.

I have no further questions.

CROSS EXAMINATION

BY MS. SULLIVAN:

Q: Did anyone talk to you about your testimony here today?

A: No.

Q: No one talked to you, tell you want to say or what not to say or —

A: No, I'm going to say what the truth is. I'm not going to be caught in a perjury.

Q: How do you know about perjury?

A: Well, I know you don't lie when you're giving testimony, and they tell me lying is perjury and that you go to jail for it.

Q: That's right.

A: And I'm not going if I can help it.

Q: Okay.

A: I've got a brother that's a guard at Raiford, but I'm not going to jail just to visit with him.

Q: So no one talked to you about anything.

A: No, ma'am.

Q: Are you sure about that trooper's name, McKinnon, Larry McKinnon?

A: Yes, ma'am.

Q: Could it have been McKenzie?

A: It might be because — I went to school with him and I've always called him McKinnon, but it might be McKenzie.

MS. SULLIVAN: I don't have any other questions.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q: You have never met me before today, have you?

A: No, sir.

Q: Have you ever met Mr. Wells, the Defendant in this case, before today?

A: No, sir.

Q: Do you know Mr. Wells?

A: No, sir.

Q: Has any representative of Mr. Wells ever approached you about any matter in this case?

A: No, sir.

(Thereupon, an off the record discussion was had.)

BY MR. JOHNSON:

Q: Hoss, this document is going to be prepared by Ms. Bass, who has been a court reporter almost five years now, and she has a stenographer's machine in front of her and also she has a tape recorder as a backup.

Now, the purpose of that is to take down accurately what you say, what I say and what Madam State Attorney says, all right?

A: Okay.

Q: After she types this up, if you are concerned that she may have heard you say spoon instead of moon, you have a chance to come down and read the document before it's made official and you can put notations on a separate page that you think at Line 27 on Page 22 that you said moon instead of spoon.

If you think she's going to take it down accurately and it will be prepared accurately, then you have the right to waive that reading as to accuracy.

Now, if you waive that right to reading its accuracy, it will be put into the court file and at some point prior to any trial that might occur in this case, either myself or the prosecutor, whoever was going to call you, would certainly provide you with a copy of it to read beforehand so you could refresh your recollection.

Now, knowing that, do you want to make arrangements for her to have you come to Gainesville and read the document or have it read to you over here — brought to you over here and read or will you waive the right to read it prior to her typing it up — I mean making it official after she types it up?

A: I'll waive that.

Q: Most people do, and it's not considered to be a big deal, as a rule, has been my experience.

A: She got a tape recorder and everything.

MR. JOHNSON: I have nothing further.

MS. SULLIVAN: No questions.

(Thereupon, the witness was excused.)

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby certify that the witness:

GROVER CLINTON BRYAN

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was reported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 24 inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 2:05 p.m. on June 4, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 16th day of July, 1985.

/s/ Mary E. Bass
MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
My Commission Expires July 23, 1989
Bonded Thru Troy Fain Insurance Co.

IN THE CIRCUIT COURT OF FLORIDA, SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,
Defendant.

DEPOSITION OF DAVID STOUT

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Palatka, Florida, commencing at 2:40 p.m. on Tuesday, June 4, 1985.

APPEARANCES

HUNTLEY JOHNSON, Esquire
Post Office Box 1322
Gainesville, Florida
of counsel for Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida
of counsel for the State of Florida

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STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

The reading and signing of the deposition by the witness is waived.

All objections, except as to the form of the question, be reserved until hearing on same or until trial.

Thereupon,

DAVID STOUT,

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: Name, occupation, rank, years of experience, please, sir.

A: David R. Stout, I'm the Assistant Chief of Detectives with the Putnam County Sheriff's Office. My tenure with the sheriff's office has been just over nine years.

Q: And the history? I assume you were a road deputy for awhile.

A: Originally, yes, I was a road officer for probably three years or so, worked a year in crime prevention, and the rest of my employment has been as a detective.

Q: Do you teach at any schools?

A: I teach in-service training, mostly.

Q: In-house for the sheriff's office.

A: Yes.

Q: Is there a Trooper McKinnon in this circuit, to your knowledge, Larry McKinnon?

A: There is a Larry McKenzie that I'm aware of, but McKinnon, I'm not sure.

(Thereupon, an off the record discussion was had.)

MR. JOHNSON: I'll state on the record that once she gives me the name and the address, that I'll consider discovery complete as far as this other officer is concerned.

MS. SULLIVAN: Okay.

BY MR. JOHNSON:

Q: Who is the head of detectives?

A: Captain Cliff Miller.

Q: Do you remember this incident involving the BMW and the eighteen pounds of marijuana?

A: Yes, sir.

Q: And do you know Martin Wells?

A: Yes, I do.

Q: Did you know Martin prior to this incident?

A: Yes, sir.

Q: Did you go to school with Martin?

A: Yes, I did. I think Martin may have been one year older than I am, but I'm not positive. We may have been even in the same grade.

Q: Have you ever been involved in vice and narcotics?

A: Very limited.

Q: This would have been after midnight that this incident occurred; is that correct?

A: Yes, sir. I do not have any personal knowledge about any of the stop involving the vehicle or the search. My entire involvement is that of chain of custody of some items that I received from the trooper at the Sheriff's Office.

Q: You did not talk to Martin Wells?

A: I might have said hello, that type of thing. He was being booked into the booking desk when I walked by.

Q: Well, Martin has indicated to me that someone at some point after the marijuana had been discovered, who he felt like was an investigator, had him brought out of the cell and sat down and questioned him and told him: "Come on, Martin, I can't believe you didn't know the marijuana was in there," and so forth.

Do you happen to know who that was?

A: No, but I can tell you for a fact it was not me.

Q: We've got you eliminated, but do you know who that may have been?

A: No sir. Like I say, I may have had a cursory hello as I was passing by, and that was about it.

Q: Do you know what Martin Wells does for a living?

A: No.

Q: Do you know anything about Martin's reputation for truth and veracity in this community?

A: Martin and I knew each other by face, mostly. Even in high school we did not associate together. I did not even — or was not aware that he was in town or out of town. I haven't seen him — it's been years.

Q: Okay.

A: I couldn't testify as to his character or reputation for truth or veracity.

Q: I think the proper predicate is do you know other people who know him who you've heard talk about those reputations?

A: Not especially.

Q: Now, what item did you come into possession of?

A: I received three thousand dollars in U.S. currency from Trooper Adams, and this was at three twenty-nine a.m. —

Q: Were you on duty then?

A: No, I was called from home.

Q: All right.

A: And also a grayish-blue colored American Tourister suitcase containing green, leafty material wrapped in plastic.

Q: Where are those items now?

A: They're at the sheriff's office in the — my custody.

Q: What time are you getting off today? After I take Adams' deposition, I would like to come down and take a look at those.

Mac already told me that I could go down and look at them, that as long as there was somebody from the sheriff's office there, he didn't need to be there, nor a representative from the State Attorney's Office.

A: If that's all right with the State Attorney's Office, that's certainly fine with me.

Q: I'm not planning on handling any of the stuff because I don't want to get my fingerprints on any of it.

A: Maybe this will help you, even.

It's completely sealed in a paper container. All you're going to be able to see is the outside wrapping.

Q: I don't think so. I think I have a right to see the actual items, and I will be more than happy to sign any documents saying that the seals were broken and that I was there when they were broken and that the chain of custody is not disturbed, because I do not plan on making a chain of custody argument in this case and I'm putting that right on the record.

A: Then I don't have any problem —

Q: Because, frankly, I do not have standing to question the search in this case unless Martin Wells is prepared to admit that that marijuana is his, and he's not prepared to do that.

A: Well, if that's okay with Ms. Sullivan, that's fine with me.

MS. SULLIVAN: That's fine with me.

(Thereupon, Robert L. McLeod entered the deposition room.)

MR. JOHNSON: He was concerned about me coming down and looking at the evidence because it's all in sealed

containers, and I said on the record that I don't plan on making a chain of custody argument in this case.

What it amounts to is I'll sign a piece of paper saying that I was there when they were opened and resealed and so forth and there was nothing wrong with them being opened.

I think I have the right to look at the evidence.

MR. McLEOD: Go ahead and let him do it with your things there.

MR. JOHNSON: I will stipulate to the chain of custody —

MR. McLEOD: Also waive any problem with chain of custody as regards that.

MS. SULLIVAN: He'll stipulate to the chain of custody —

MR. McLEOD: Then I've got no problem at all.

MR. JOHNSON: As far as once Stout get it. Before Stout gets it from Adams -

MS. SULLIVAN: Of course. I mean from Adams —

MR. JOHNSON: I'm talking about once Stout —

MR. SULLIVAN: From the trunk of the car to the sheriff's office.

MR. JOHNSON: Right, no problem.

(Thereupon, an off the record discussion was had.)

MR. JOHNSON: I don't plan on making a chain of custody argument as it pertains to once the marijuana comes into the possession of Mr. Stout, unless when I talk to the crime lab analyst he says that they just found the

marijuana laying out in the street in Jacksonville one day because it had been just dropped off in the street with a note saying: Please give this to the FDLE Lab.

BY MR. JOHNSON:

Q: Are those the only items?

A: Those are the two items, yes, sir.

Q: Now, I see in the lab report that certain fingerprints — have you got a copy of the lab report?

A: Yes, sir, I do.

Q: Certain fingerprints have been provided to the FDLE.

Can you tell me who Joe Cobb is?

A: Joe Cobb is a deputy sheriff, Trooper Rodney Adams, of course, and then there is a Deputy Tim Brown,

Q: Why were Joe Cobb and Tim Brown's fingerprints submitted?

A: My understanding is —

Q: We'll call this hearsay.

A: Okay, is that Deputy Cobb and Deputy Brown either assisted the trooper or somehow had come in contact with it or may have touched the suitcase or the contents, so we were concerned with sending their fingerprints for elimination purposes.

As you've seen the report, I'm sure, their fingerprints were identified as having touched the package at some point in time.

Q: Let me ask you this.

Did anybody ever indicate to you that the two gentlemen from K and S Wrecker handled this suitcase in excess of ten minutes as they pried it open with their knives?

A: I'm not aware of that, no, sir. I'm aware of the persons whose fingerprints were obtained and sent.

Q: David, another thing you're telling me here is that Joe Cobb and Tim Brown are witnesses in this case.

A: That's kind of up to you.

Q: If they handled the suitcase, they're clearly witnesses; are they not?

A: I don't know if it's something as simple as one of them happened to walk in and go like this (demonstrating) and picked his hand back up and then — so his fingerprints were sent off.

I can't tell you to what degree or what capacity other than I was informed that they might have touched the package.

Q: Let me tell you what I'm concerned about.

A: Okay.

Q: I just really don't need for this young man to get convicted at trial and then some lawyer to come in and say that I didn't properly take discovery after I found out about these two guys.

MR. JOHNSON: Maureen, how would you like to handle this? Do you want to have David see what their involvement is to make the decision if you-all think they're witnesses, because if it's as inadvertent he just said, then I don't think they're witnesses.

My problem is is that Martin indicated to me that there were numerous police officers at the scene and we've only got the names of two.

MS. SULLIVAN: My question is are you concerned in reference to the chain of custody to which you're stipulating to, because this is what the —

MR. JOHNSON: No, no, I'm not.

MS. SULLIVAN: Are you concerned in reference to the DUI as to observing the Defendant's condition, or are you concerned with what statement the Defendant could have made, which I'm required to give you anyway before I can even use it at trial.

MR. JOHNSON: I understand that, but they may have some Brady material that I might need —

MS. SULLIVAN: Which I'm required to give you anyway.

MR. JOHNSON: But if you don't know about it.

MS. SULLIVAN: Right.

MR. JOHNSON: It's not your fault and that's not prosecutorial misconduct.

I'm saying would you like for me to subpoena them or — because if you talk to them and tell me they don't know a damn thing about the case, that will be sufficient for me is what I'm saying, because I don't need to take these guys off the road if they know absolutely nothing about this case.

MS. SULLIVAN: I don't know what they know, I sincerely don't know.

MR. JOHNSON: All right.

MS. SULLIVAN: The safe thing to do would be to subpoena them and take their deposition, or you can allow me to get ahold of them, or we can talk to Trooper Adams and see what his knowledge is about what they could possibly testify to.

BY MR. JOHNSON:

Q: But they're both Putnam County Sheriff's officers?

A: Yes, Joe Cobb and Deputy Tim Brown.

Q: And they're both road deputies.

A: They're both uniform officers, yes.

Q: But you don't know whether they were on the road that night when this went down.

A: No, sir.

Q: Okay.

A: As I recall, I want to say that Joe Cobb, I believe was at the office when I got there during the early morning hours after I was called out of bed.

I don't recall whether Tim Brown was there or not, he could have been in a different part of the building, but it seems to me that Joe Cobb was down there with the trooper.

Q: What is the criteria for you being called out of bed?

A: This is a rather unusual circumstance in that I do not believe at that time they even — at this time that the highway patrol has the capacity to safely store large amounts of cash or larger amounts of marijuana, that their facility does not allow that, and we —

Q: Larger? This is a large amount of marijuana?

A: Well, we're talking about seven thousand fifty grams.

Q: This is personal consumption. This guy had a bad habit.

MS. SULLIVAN: For you, maybe.

MR. JOHNSON: For me for sure.

A: Maybe the Court will take judicial notice of that, but I doubt it seriously.

Q: He might.

A: But to us in law enforcement who make puny livings, this is a significant amount of money and marijuana.

Q: So that's the reason you were called out, was so there wouldn't be any snafus with losing the money or having chain problems with the marijuana.

A: Exactly.

Q: Is that the extent of your knowledge abut this case?

A: I can tell you more things about chain of custody issues.

Q: Okay.

A: I'm the one that personally delivered it to the laboratory.

Q: You drove it up there?

A: Yes, sir, and I'm the one that personally picked it back up, and it's been in my custody ever since.

Q: David, as a sworn law enforcement officer under oath, is there even the slightest glitch in the chain of custody from the point at which it came into your custody until the present time, as far as you're concerned?

A: No, sir. That evidence has never left my hands.

Q: Except when it's under lock and key.

A: Yes, sir.

Q: And how many people have locks or keys or both to the evidence locker?

A: There is Captain Miller, who is my boss, who is like the alternate custodian, and Detective Ann Sassman, who is also the alternative evidence custodian.

Q: Have you discussed this case with Adams?

A: In what fashion?

Q: Have you discussed this case with Adams at all?

A: Very minorly.

Q: As to what occurred on the highway that night?

A: No, I don't have any knowledge as to what happened.

Q: As to what occurred when he located the marijuana in the trunk of the car in the suitcase.

A: No, sir.

MR. JOHNSON: I have no further questions.

MS. SULLIVAN: I have no questions.

(Thereupon, the witness was excused.)

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby certify that the witness:

DAVID STOUT

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was reported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 16 inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 2:40 p.m. on June 4, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 17th day of July, 1985.

/s/ Mary E. Bass
MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
My Commission Expires July 23, 1988
Bonded Thru Troy Fain Insurance Co.

CERTIFICATE

STATE OF FLORIDA COUNTY OF PUTNAM,

I, EDWARD L. BROOKS, Clerk of the Circuit Court for the County of Putnam, State of Florida, do hereby certify that the foregoing pages 1 to 196 inclusive contain a correct transcript of the record in the case of MARTIN LESLIE WELLS VS. STATE OF FLORIDA and a true and correct recital and copy of all such papers and proceedings in said cause as appears from the records and file of my office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 25th day of November, 1985.

EDWARD L. BROOKS
Clerk of the Court of Putnam County
By /s/ Jeanette S. King
Deputy Clerk

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

DEPOSITION OF WILLIAM KENNEDY

Pursuant to due notice, the deposition of the above-named witness was taken by the Defendant, before Mary E. Bass, Court Reporter and Notary Public, State at Large, at the Putnam County Courthouse, Palatka, Florida, commencing at 2:30 p.m. on Tuesday, June 4, 1985.

APPEARANCES:

HUNTLEY JOHNSON, Esquire
Post Office Box 1322
Gainesville, Florida
of counsel for Defendant

MAUREEN SULLIVAN, Esquire
Assistant State Attorney
Putnam County Courthouse
Palatka, Florida 32078
of counsel for State of Florida

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STIPULATIONS:

It is hereby stipulated and agreed by and between the witness and counsel for the respective parties as follows:

All objections, except as to the form of the question, be reserved until hearing on same or until trial.

Thereupon,

WILLIAM KENNEDY

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: State your name, please, sir.

A: William Harry Kennedy.

Q: And what do you like to be called?

A: Bill.

Q: Is it all right if I call you Bill?

A: Yes.

Q: Bill, do you recall the night that the BMW was brought in that belonged to Martin Wells? Martin Wells was driving the car when he was arrested for DWI and subsequently, it's my understanding from talking to Hoss, that you-all

searched the car, opened the trunk and then had to pry open the suitcase.

Do you remember the night I'm talking about?

A: Yes.

Q: Now, it's my understanding further that you did not ride with Hoss out to the scene to pick up the vehicle.

A: That's right.

Q: So the first time you saw the vehicle would have been when it actually arrived at K and S Wreckers.

A: Yes.

Q: Tell me about it, when you first saw it and what happened.

A: Well, Hoss came through the gate with the wrecker. I opened the gate for him to come back in the yard, and he pulled over and — he didn't even drop it, he just pulled over to his trailer.

Then the officer came later and I went over there with him. We searched the car and opened — well, they opened the trunk and sat the suitcase down on the ground and then searched the car. Then later on we took inventory of what was inside the car.

Then he said: "There is some way to get into that thing," and was looking all about the suitcase —

Q: Whenever you're saying "he," are you talking about Trooper Adams?

A: Yes.

Q: Now, were you present when Trooper Adams asked Hoss if he knew how to get into the trunk of the car?

A: Yes.

Q: Were you present when Trooper Adams expressed surprise that Hoss could open the trunk with the key?

A: Yes.

Q: Hoss had explained to us in his deposition that you have to put the key into the button and then push in the button and turn it before it will open.

A: That's true.

Q: And Hoss has suggested that Trooper Adams showed surprise, said something to the effect that it was a new one on him, that he did not know how to open the trunk with the key.

Do you recall any testimony like that — not testimony, but any statements like that from Trooper Adams upon the trunk being opened with the key?

A: At the beginning he said: "It won't open," and Hoss said: "Oh, yes, it will," and then it just opened right up, and he said: "I'll be damned."

Q: That was Trooper Adams saying that.

A: Right.

Q: Did Trooper Adams indicate to you how he knew that it would not open? Did he indicate he had tried to open it earlier with that same key?

A: I believe he said something to the fact that the key wouldn't open it on the highway.

Q: You feel reasonably certain about that, don't you?

A: Yes.

Q: Now, that would indicate that you don't know whether Trooper Adams actually tried it or somebody else tried it, but that Trooper Adams had knowledge that — at least he expressed it as though it were knowledge, that the key would not open the trunk, and subsequently Hoss did, in fact, open the trunk with that key.

A: Yes.

Q: Correct?

A: Right.

Q: Now, what did you-all find inside the car, the passenger areas?

A: It's been awhile back.

Q: How about two roaches?

A: Yes, in the ashtray.

Q: And that was all, as far as you know that you found, by way of contraband?

A: As far as that goes, yes.

Q: Do you remember there being any paperwork, things that looked like contracts, anything like that in any of the glove compartments or in the front seat or the back seat?

A: There was quite a few papers, you know, but I just considered them normal papers to be in a car.

Q: Okay.

A: Gloves, sunglasses and a few other odds and ends; I can't remember all of them.

Q: When you say normal papers, do you mean like ownership papers? What are you saying by normal papers?

A: I can't remember exactly what they were, but tnere were papers in the glove box, and if I ain't mistaken, there was some laying between the seats.

Q: Did Trooper Adams ever tell you whether the Defendant, Mr. Wells in this case, had given him any explanation as to where the money had come from?

A: No.

Q: Did Trooper Adams seems to feel that there was going to be drugs in the trunk if you-all could get in the trunk?

A: In my opinion, yes.

Q: Did he indicate that verbally?

A: He says: "I knew there was more to this, I got to check it out."

Q: That's before he went in the trunk.

A: After we had — when he was looking in there, he said: "There's something black in there," you know, he had to pry it apart and look in that suitcase.

Q: So he pried the suitcase apart where it comes together, and then he saw something black in there?

A: Yes.

Q: And that's when he said: "I want you-all to get in that suitcase?"

A: Right.

Q: And according to Hoss, I understand you-all played around with the combination for awhile but could not get it to work, so you had to take your knives out and work along the edges and basically pop open the —

A: Actually pop it open.

Q: Is that correct?

A: Right.

Q: Did you ever put your hands on the trunk of the car?

A: I must have, yes.

Q: And are you right or left-handed?

A: Right-handed.

Q: And while you were using the knife with your right hand, I assume that you were holding some part of the suitcase with your left hand.

A: Yes.

Q: Would it be fair to say that you moved your left hand several times and touched several portions of the suitcase?

A: Oh, yes.

Q: Who was —

A: I actually put the suitcase in his car — in Mr. Adams' car.

Q: So you actually carried it by the handle.

A: No, I had it like this (demonstrating).

Q: All right.

A: I said: "What do you want me to do with this, and he said: "Put it in the back seat." I said: "Okay."

Q: So when the suitcase was originally moved from the trunk of the car that Mr. Wells was occupying that night, did Trooper Adams pick it up by the handle and put it on the ground?

A: I really didn't see how he picked it up, but I know he picked it up and put it on the ground.

Q: Did you ever hear anybody express any concern about fingerprints in this case as far as: Be careful the way you handle anything?

A: No.

Q: Now, when Trooper Adams got inside the suitcase, did he handle the black bag?

A: Oh, yes.

Q: Did he handle —

A: A bag.

Q: There was only one bag.

A: I believe it was.

Q: If Hoss said that there was one black bag inside of another black bag, would that refresh you recollection or do you only recall one?

A: Well, when Trooper Adams got to the bags, he didn't take his time and unroll it or nothing, he just tore it.

Q: Tore it open?

A: Right, tore the corner, and he just dropped everything and went straight to the car, left it all sitting right there.

Q: Dropped it right on the ground there?

A: Yes. He was kind of excited.

Q: He got excited about it.

A: Yes.

Q: He was happy.

A: Oh, yes.

Q: I have a lab report here that indicated that the prints of a Joe Cobb and a Tim Brown were sent to Tallahassee or Jacksonville, one or the other.

Do you know who either one of those two people are?

A: No, I don't.

Q: Has anyone ever asked you for your fingerprints in connection with this case?

A: No, they haven't.

Q: Have you heard the troopers or any law enforcement officers discuss this case or any aspect of it in front of you?

A: No, I haven't.

Q: Do you know what Mr. Wells does for a living?

A: No.

MR. JOHNSON: Do you have any questions?

MS. SULLIVAN: No.

BY MR. JOHNSON:

Q: Has anybody contacted you about your testimony here today prior to today?

A: No.

Q: Anybody who supposedly was a friend of Mr. Wells or myself or anybody from the State Attorney's Office or law enforcement?

A: No.

Q: So you're coming in here, basically, cold turkey; is that fair enough?

A: That's fair enough.

Q: Now, you have the right after this is typed up and before it is actually placed in the court file to read this deposition to see if you think that Ms. Bass may have taken something down erroneously.

She has a stenographer's machine which puts up little symbols that I'm sure you and I will never understand as long as we live, but she does because she got trained in it, and she's got a tape recorder as a backup.

Now, after she types it up, she files it with the court as an official court document, but if you're concerned that maybe she took down a word or the word sounds on the tape recorder different from what you actually said, you can read it before it's filed and on an extra sheet of paper make a notation that you think on Page 12, Line 19 that I said green instead of spleen, or whatever.

Most people waive that right. Hoss waived it, but if you want us to make arrangements to have the document brought over to you beforehand so that you can read it for accuracy, we'll be glad to do that.

One other thing I'll tell you is if we go to trial on this case, I'm sure whichever side, the state or the defense, decides to call you as a witness will provide a copy of it to you so you can read it to refresh your recollection. Don't be afraid that you're not going to be able to see it beforehand to refresh what you said here today.

A: It will probably be awhile before we get there and I'll forget it.

Q: No, it probably won't, not in this county. We'll probably be there pretty quick, like July.

So knowing that, would you like to come over here and read it or would you like to waive that reading?

A: I'll come over and read it just to make sure.

MR. JOHNSON: No further questions.

(Thereupon, the witness was excused.)

STATE OF FLORIDA COUNTY OF ALACHUA

I, Mary E. Bass, Court Reporter and Notary Public, State at Large, do hereby certify that the witness:

WILLIAM KENNEDY

was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness(s) was reported by me in stenograph, reduced to typewriting under my direct supervision; that the foregoing pages numbered 1 through 12 inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the deposition was taken at the Putnam County Courthouse, Palatka, Florida, commencing at 2:30 p.m. on June 4, 1985.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 17th day of July, 1985.

/s/ Mary E. Bass
MARY E. BASS
Macdonald Court Reporting Service

Notary Public, State of Florida
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IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

TESTIMONY and PROCEEDINGS before the Honorable E. L. Eastmoore, Circuit Judge, taken at the Putnam County Courthouse, Palatka, Putnam County, Florida, on Thursday, the 8th day of August, 1985, as reported by Terry T. Hurley, Deputy Official Court Reporter.

APPEARANCES:

MAUREEN SULLIVAN, Esquire
Assistant State Attorney

HUNTLEY JOHNSON, Esquire
Attorney for Defendant

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Rodney A. Adams	5	45

THE COURT: All right. We have a Motion to Suppress filed by the Defendant in the case of the State versus Martin Leslie Wells, Case Number 85-167-CF, represented by Mr. Huntley Johnson.

Alright. Mr. Johnson, the Court will hear your argument on the Motion.

MR. JOHNSON: Your Honor, we have four witnesses to call. Would you like for us to bring them all in and swear them at the same time, or do it individually?

THE COURT: Let's bring them in and swear them at the same time.

(The witnesses were duly sworn.)

THE COURT: All right. Do you want to place them under the Rule?

MR. JOHNSON: Yes, sir.

THE COURT: All right. Each of you has been summonsed as a witness in this proceeding. A Rule of Procedure is placed into effect by which you're required to remain out of the hearing room at all times except when you're actually testifying. And while you're waiting to testify and after you have done so, you're not to discuss your testimony or anything relative to this case, among yourselves or with anyone else, except that you may talk with Ms. Sullivan who represents the State of Florida, or Mr. Johnson who represents the Defendant.

You will now retire from the courtroom until you're called to testify.

MR. JOHNSON: We're going to call Trooper Adams, Your Honor.

THE COURT: All right. You may remain, Trooper Adams.

Gentleman, we have a rule against weapons in the courtroom. You'll have to check your weapons with my secretary or with Ms. Varnes. You may not bring them into the courtroom.

MR. JOHNSON: Your Honor, at Defense table is Sharon Ehrenrich, who is my partner.

THE COURT: All right.

MR. JOHNSON: All right. For the record, her name is spelled E-h-r-e-n-r-i-c-h. I would assume it would be all right if she speaks to the witnesses as far as the Rule goes?

THE COURT: No, sir.

MR. JOHNSON: Just myself?

THE COURT: Has she filed a Notice of Appearance in the case?

MR. JOHNSON: She has signed some of the documents. She has not filed a Notice of Appearance.

THE COURT: She has signed some of the documents for you?

MR. JOHNSON: Yes, sir.

THE COURT: All right.

MR. JOHNSON: Thank you, sir. May it please the Court?

THE COURT: You may proceed.

RODNEY A. ADAMS,

having been produced and first duly sworn as a witness, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON:

Q: State your name, please, sir.

A: Trooper Rodney A. Adams.

Q: Could you tell us where you're stationed at the present time?

A: Stationed at the FHP Station here in East Palatka.

Q: How long have you been a member of the Florida Highway Patrol?

A: Exactly one year, three weeks.

Q: Can you tell the Court when you went to Police Standards School, please?

A: It was back in April of '84.

Q: Graduating when?

A: July of '84.

Q: And at that time you were accepted into the Academy?

A: In April, yes.

Q: So that was the Academy that you went to?

A: That's right.

Q: So it's approximately a year that you have been a member of the Florida Highway Patrol, is that right?

A: That's correct.

Q: Seated at defense table is Martin Wells.

MR. JOHNSON: Could you stand up, Mr. Wells.

Q: Trooper Adams, do you recognize this gentleman?

A: I do.

MR. JOHNSON: Thank you, Mr. Wells.

Q: Can you tell me when you first encountered him?

A: On a routine stop back in February of '84 on a speeding violation.

Q: All right. Can you tell us where you were when you stopped him?

A: At the time I was headed southbound on 207, I guess from, I'd say, the area of Orange Mills.

Q: And in what direction was Mr. Wells' car proceeding?

A: Northbound.

Q: I assume you clocked him with the radar?

A. I did.

Q: And what was the reading?

A: It was — I believe it was 60 in a 50.

Q: All right. And I assume you turned around and pursued him and stopped him, is that correct?

A: I did.

Q: And was there anything unusual about the manner in which he operated the vehicle?

A: None.

Q: Was there anything unusual about the manner in which he parked the car?

A: None.

Q: Did he respond immediately to pulling his car off the road as soon as you hit your blue lights?

A: He did.

Q: And was his car parked off the road in such a manner it was not a traffic hazard?

A: It was.

Q: It was not a traffic hazard, is that correct?

A: That's correct.

Q: All right. Now, can you tell this Court Mr. Wells' demeanor as you dealt with him, as far as him being a gentleman or obnoxious.

MS. SULLIVAN: I'm going to object to leading.

MR. JOHNSON: Your Honor, I will rephrase the question.

THE COURT: All right.

BY MR. JOHNSON:

Q: Can you tell the Court the demeanor of Mr. Wells when you dealt with him on the evening of February the 11th?

A: It was quite cooperative, no signs of being cocky, argumentative in any way.

Q: Did he appear to have any difficulty whatsoever understanding what you were saying?

A: None.

Q: Did you have any trouble understanding what he was saying?

A: No, I didn't.

Q: Now, I understand that at some point you performed a license check, is that correct?

A: I did.

Q: And what did you find upon performing that license check?

A: Upon performing that check I found out that his license were expired?

Q: Now, that's not to say suspended or revoked, but merely expired?

A: That's true.

Q: Now, did Mr. Wells tell you where he was going that night?

A: Yes, he did.

Q: Where was he going?

A: To St. Augustine.

Q: Can you tell this Court approximately how far you were from St. Augustine when you stopped Mr. Wells; where his vehicle was parked?

A: I would say about twenty, twenty-six miles, maybe a little less than that.

Q: All right. It takes about a half-hour to get there from where he was?

A: About twenty minutes.

Q: Twenty minutes minimum?

A: Right.

Q: Maybe twenty-five if he did the speed limit?

A: Possibly.

Q: Okay. And how long would it take to go from where he was stopped back to Palatka?

A: About five to ten, maybe.

Q: All right. Are you familiar with which wrecker service the Putnam County Sheriff's Office uses, and hence the Florida Highway Patrol here in this County?

A: Well, we use quite a few. I don't about the Sheriff's Department.

Q: All right. Is there one that's on call each evening?

A: We have a list that we use per se, a rotation list that we use.

Q: It's rotation.

A: Right.

Q: And on a given night a given wrecker service will be on duty?

A: On a given night whichever service that is available that hasn't been used previously for the last wrecker call is used for the next call.

Q: All right. Is that something you know when you've out on the road?

A: I do.

Q: On February 11th then when you stopped Mr. Wells you knew that K & S Auto was the wrecker service in question?

A: I was advised that was the wrecker service in question.

Q: All right. Are you also familiar with how far it is fromK & S to where you had stopped Mr. Wells?

A: I did.

Q: K & S as I understand it is on the northwest side —

MS. SULLIVAN: Objection, Defense Counsel is testifying, he's been repeatedly testifying.

THE COURT: It's inconsequential as to where this place is. It really doesn't make any difference.

Counsel, approach the bench.

(The following was held at side bar.)

THE COURT: Okay. Now, you tell me what you'll stipulate to.

MS. SULLIVAN: I'll stipulate that he was stopped and arrested for DUI; that he observed three thousand dollars in cash lying in the front — not three thousand, but a large quantity of cash laying in the driver's side of the car.

MR. JOHNSON: On the floorboard.

MS. SULLIVAN: On the floorboard.

MR. JOHNSON: It's crucial as to when he did, Your Honor, for our purposes of what we're trying to establish in the motion.

MS. SULLIVAN: Okay.

THE COURT: There's no real question as to when he did it.

MR. JOHNSON: Well, what happened, you're —

MS. SULLIVAN: No, it's just the trooper and his client.

Is your client going to testify? I mean, those are the only two people out there.

That my trooper asked him whether or not he could look in the trunk of the car after he was under arrest. His client consented to it. Inside the trunk was a locked suitcase. They couldn't open the trunk, the trunk was opened at the wrecker station after his client had been processed at the jail. When they did open the trunk they had to pry it open with crowbars — not the trunk, but the suitcase in the trunk, they had to pry it open with crowbars, and inside that was a bag containing eighteen pounds of cannabis.

Subsequently his handprint, or part of his handprint, a partial palm print was found inside on one of the bags that was wrapped around the cannabis.

That's what I'll stipulate to, Your Honor, but I don't see where we need to go into this time and that time.

THE COURT: Mr. Johnson, what portion of that do you not agree are the facts as the witness will testify?

MR. JOHNSON: Your Honor, it's minutio as to the distinction. For example, they used knives rather than a crowbar to pry open the suitcase, which is not crucial, but it's our position that this witness's memory is crucial, and I've reserved two hours, and, Your Honor, I'm not trying to waste the Court's time, but I feel like in order to properly put this before Your Honor —

THE COURT: You may have asked for two hours, I did not grant two hours. I granted time for a hearing. We're going to get this thing over with as fast as possible, and I'm not, Mr. Johnson, going to waste this Court's time going through minutio, witness-by-witness, to go into facts which the State is prepared to stipulate to. There's absolutely no point in it.

Now, if we can get this thing over with in twenty minutes, we'll get it over with in twenty minutes. If it takes two hours, I'll take two hours.

MR. JOHNSON: Your Honor, I will certainly defer to the Court's ruling in attempts to avoid those areas that have been stipulated to. For one thing, there was no mention in our Motion whatsoever about any fingerprints, which the Prosecutor just stipulated to. We haven't even mentioned that —

MS. SULLIVAN: Standing, would they?

MR. JOHNSON: If I get in —

MS. SULLIVAN: Well, that's —

THE COURT: Let him finish.

MS. SULLIVAN: Okay.

MR. JOHNSON: In answer to that, he's in control of the vehicle, the vehicle's got marijuana in it, he's the only one there, we suggest they're standing, and I don't think the State's going to oppose that. But be that as it may, Your Honor, at any point that you feel like I'm getting into an area that's stipulated to, if you'll simply interrupt me I'll immediately go into the next point. I'm not trying to waste the Court's time, I'm not trying to be clever with this motion, Your Honor.

THE COURT: All right.

(Following the side-bar conference, the following further proceedings were had.)

BY MR. JOHNSON:

Q: Trooper Adams, upon doing a license check of the Defendant, it's my understanding that you at that point

detected some symptoms on him that caused you to arrest him, is that correct?

A: That's correct.

Q: All right. What did you detect, and what did you arrest him for?

A: I detected the odor of an alcoholic beverage, and that's when I arrested him for DUI.

Q: You had him perform the field sobriety test and so forth?

A: I did.

Q: Now, can you tell this Court if in your opinion he was fit to drive that night?

A: Based on my opinion?

Q: Yes.

A: No.

Q: He was not?

A: No.

Q: Do you recall me taking your deposition at 3:00 p.m. on Tuesday, June the 4th, 1985?

A: I do.

MR. JOHNSON: Page 23, Madam State Attorney, and line 12. I'm sorry, line 10.

BY MR. JOHNSON:

Q: Do you recall me asking you this question and you giving this response:

"Question: Would you give him the benefit of the doubt —"

I'm going to have to go back. Pardon me. Page 22:

"Question: Ability to drive —"

I'm going to ask you if you remember me asking you these questions and you giving these responses.

Question on my part: "Ability to drive, you did not check anything on the AIR. Do you have an opinion as we sit here now as to whether he could have driven or not?

"Answer: Yes.

"Question: He could have driven?

"Answer: That's a possibility.

"Question: You would have checked fit then, is that correct?

"Answer: Perhaps, I'm not going —

MS. SULLIVAN: I'm going to object at that time, because at that time I reserved an objection on the record. The question that Mr. Johnson asked in the deposition was a hypothetical question, and it called for speculation on the part of this Defendant — I mean this witness, as to the Defendant's condition at that time. And I objected, and I reserved my right to be heard on that here at trial.

Is that correct, Mr. Johnson?

MR. JOHNSON: Yes.

THE COURT: The objection is sustained. I can't agree it was a proper question at the time.

Go ahead with whatever it is you're attempting to accomplish by the reading of those questions and answers.

MR. JOHNSON: Well, Your Honor, if I might be heard, this is not in the way of testimony, if I could tell the Court what I intended to show for the record.

THE COURT: By that question?

MR. JOHNSON: Your Honor, by the time we get through the soliloquy it would be my position that the deposition would show that the Trooper said that —

MS. SULLIVAN: I'm going to object to anything that you might say about the substantive response of this trooper on that. I reserved it at the deposition, Your Honor.

THE COURT: All right. You've been heard. Go ahead, Mr. Johnson.

MR. JOHNSON: Your Honor, she's reserved it on the basis of it being a hypothetical question. The trooper testified at the deposition that he forgot to check either fit or unfit to drive. I asked him at that time if he had not forgotten would he have checked fit or unfit, and his testimony at that time is he would have given him the benefit of the doubt and checked fit.

Now, I would suggest that's impeachment, and I don't see how it's a hypothetical question. I didn't understand then, and I don't now, because we're asking him if he had not overlooked, looking back to his recollection of when he made the arrest in February, would he have checked fit or unfit.

THE COURT: It's a speculative question, and that's the basis upon which I sustained her objection. And my ruling still stands.

MR. JOHNSON: All right, sir.

BY MR. JOHNSON:

Q: Were you able to ascertain where the Defendant was employed?

A: Yes, sir, I was.

Q: And where was that?

A: Kurt's.

Q: And did you ascertain where that is?

A: In St. Augustine.

Q: Now, as I understand it, you typed a report in this case, is that correct?

A: I did.

Q: And you typed it from memory?

A: I did.

Q: And it's a one-page report?

A: That's correct.

MR. JOHNSON: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. JOHNSON:

Q: I show you a copy of the report. Is this the report?

A: That's the one.

Q: All right. Now, Trooper Adams, in this report you were attempting to do what; what was the reason for writing this report?

A: It was a report based on what I had observed during my arrest, and what I had come upon during the arrest.

Q: All right. And when you do a report, sir, you do it based upon what you feel is important for your recollection should this case come up later on, is that correct?

A: That's correct.

Q: And you put in there what you feel is pertinent and important to that arrest.

A: That's right.

Q: And you don't ever intentionally omit anything, do you?

A: Not intentionally, no.

Q: All right. Now, when you talked to Mr. Wells he made certain representations to you that night, is that correct?

A: That's right.

Q: Concerning the status of his driver's license and so forth?

A: That's right.

Q: And then you ran a record check, is that correct?

A: That's correct

Q: And everything that Mr. Wells told you turned out to be correct as far as that was concerned, is that correct?

MS. SULLIVAN: I'm going to object that every single solitary question that Mr. Johnson has asked has been a leading question, and has asked for an affirmation on behalf of the trooper. The State would request that the trooper be the one that gives the response, and Mr. Johnson ask the questions.

THE COURT: You are leading him, Mr. Johnson. Rephrase your questions so that they are not leading.

MR. JOHNSON: Yes, sir, I have no problem with that. I'm simply attempting — when we get to something crucial I won't lead him, I'm simply attempting to get to it.

THE COURT: She's objected, so in face of that objection I cannot permit it.

MR. JOHNSON: I understand.

BY MR. JOHNSON:

Q: Now, what did you do chronologically — could I ask what you're referring to, sir?

A: The same report that you have.

Q: Okay. Fine. Could I ask you to tell this Court what you did chronologically once you decided to arrest Martin Wells; in order from that point forward, what happened?

A: Okay. It's speaking from the time that I had him go through the tests?

Q: That will be fine if you're talking about the sobriety tests.

A: That's right, field sobriety tests.

Q: Field sobriety. Go ahead.

A: Okay. After I had him do the field sobriety tests I went ahead and read him the Implied Consent.

Q: His what?

A. Implied Consent.

Q: Did you read it off a card?

A: I did.

Q: And that's Implied Consent for what?

A: To request a test for breath.

Q: All right. That's the Breatholyzer Implied Consent?

A: BAC.

Q: Okay. Then what happened?

A: Then from there I — let's see. I gave him the test —

Q: Wait a second. You gave him what test?

A: I'm just restating what I already said.

Q: Okay. If you could, be specific as to which test. It would be helpful for the record, because there are several tests that you gave him. So if you could just be specific.

Are you talking about the sobriety tests?

A: That's right, field sobriety test.

Q: Okay. Starting over again.

A: I gave him the field sobriety test and informed him I was going to take him in for DUI, and he then asked me if he could get his jacket out of his car, and I told him to hold on a second I'd go back with him. And I walked back to the car with him to get a jacket out of his car.

Q: Okay. Trooper Adams, did you say something to Mr. Wells that made him think he needed his jacket?

A: No, I didn't. It was cold, it was in February.

Q: Okay. Well, you said you decided to place him under arrest and you read him the Implied Consent, is that correct?

A: That's right.

Q: He agreed to the Implied Consent?

A: He did.

Q: And he agreed to take the Breathalyzer test?

A: He did.

Q: You don't have a Breathalyzer machine out there on 207.

A: No, we don't.

Q: You don't have what's called a Batmobile that can come out and take a breath test.

A: We don't have anything in this County.

Q: All right, sir. Where were you going to take him to do the breath test?

A: The FHP Station.

Q: And when were you going to take him there?

A: After we finished our field sobriety test, and after he agreed to take it.

Q: Okay. At the point you were getting ready to get into the car to go to the Highway Patrol Station, Mr. Wells asked you something, is that correct?

A: That's right.

Q: What did he ask you?

A: If he could get his jacket out of his car.

Q: All right. And you replied?

A: Yes.

Q: Did you wait for him, or did you go with him to get his jacket?

A: We stepped back together.

Q: And did you go up with him to the car?

A: I did.

Q: To his car.

A: I did.

Q: And did he retrieve a jacket?

A: Yes, he did.

Q: Did you make any observations at the time he retrieved the jacket?

A: I did.

Q: Now, up until that point had you called for a backup?

A: I did call for a backup as far as assistance, yes.

Q: Before or after y'all went to get the jacket?

A: This was after we got the jacket.

Q: So may we conclude that prior to going for the jacket you had called no backup, is that correct?

A: That's correct.

Q: So you go to the car, you see the jacket, and you make an observation of some money, is that correct?

A: I did.

Q: Where was the money?

A: The money was lying on the floorboard of the driver's side.

Q: Did you notice any of the denominations; can you recall?

A: Twenties, that's about it.

Q: Did you inquire of the Defendant how much money there was there?

A: I asked him where did the money come from and whose was it.

Q: If Martin Wells had not asked for that jacket what would y'all have done?

MS. SULLIVAN: I'm going to object, this questioning also calls for speculation on the part of the witness.

MR. JOHNSON: Your Honor, if I might.

THE COURT: If you might what?

MR. JOHNSON: If I might be heard on her objection.

THE COURT: Go ahead.

MR. JOHNSON: Your Honor, it's not speculation if they were getting into the vehicle and preparing to leave, and at that time Mr. Wells asked for his jacket, and that's the only reason they stayed. Certainly the trooper knows exactly what he was doing. He was getting ready to exit the area and go back to the station.

THE COURT: I think that's probably a proper question. The objection is overruled.

BY MR. JOHNSON:

Q: Do you understand the question?

A: I do.

Q: What were you going to do if Mr. Wells had not asked for his jacket?

A: Well, based on the regulations we go by, if I was going to place him under arrest for DUI I would have towed the

car regardless, and from there, upon towing it, we would have to do an inventory search.

Q: You're not answering my question. Do you understand my question?

A: I do.

Q: What were you preparing to do when Martin Wells asked if he could get his jacket?

A: What was I preparing to do?

Q: Yes, sir. Were you preparing to enter your vehicle?

A: We were standing between vehicles when he asked me to get his jacket out. I just told him that we would step back and get it. So that's what we did.

Q: Maybe I misunderstood your testimony. Did you testify earlier that y'all were preparing to go down and take the Breathalyzer test when he asked for his jacket?

A: That's right, but we had never approached the cars as far as doors or anything. We were still between cars.

Q: My question stands: What were you going to do if he hadn't have asked to get the jacket?

A: If he hadn't gotten the jacket?

Q: If he had not gotten the jacket, what were you going to do?

A: Place him in my car and take him to the patrol station.

Q: Okay. And then take the Breathalyzer?

A: That's right.

Q: Okay. Now, you see the jacket, you see the money. What do you do at that point?

A: At that point I asked him to step back from the car, and I investigated the vehicle itself myself, and —

Q: "Investigate." Can you clarify for the Court what that means?

A: In other words, I checked to see how much money is there, how it's, you know, the money, what else is there in the vehicle, and such. That's about it.

Q: Well, how did you go about doing that? I can't lead you, so if you can just tell us how you did that.

A: Okay. What I did was I asked Mr. Wells to step back from the car, and then took a look at the money lying on the floor, and shined my light throughout the vehicle to see if there was anything else, as far as any other contraband other than the money.

And at that point I then —

Q: Would you define "contraband" for this Court.

A: Anything, let's say — for this particular purpose I'd say anything other than was there more money than what I was seeing just there on the floor.

Q: So you were looking for money, not contraband, right?

A: At that time, yes.

Q: Money can become contraband, but money is what you're looking for, is that correct, sir?

A: That's right.

Q: All right. Did you ask Mr. Wells' permission to enter the car?

A: I did.

Q: And he gave it to you?

A: Yes, he did.

Q: All right. Now, at whatever point someone else arrived, if you'll let me know when that occurs when we're going along, I'd appreciate it, if another trooper or deputy arrived.

A: Okay.

Q: At this point there's not another law enforcement officer there, is that true or not?

A: There's nobody there but me.

Q: Now as you've testified earlier, after you found the money you called for a backup?

A: That's right.

Q: Who responded first, do you remember?

A: There was one trooper, Trooper McKenzie, and there was a deputy followed by two other deputies.

Q: My question, sir, is who responded first?

A: FHP.

Q: All right. Trooper McKenzie?

A: That's right.

Q: Do you recall having a conversation with Trooper McKenzie upon his arrival?

A: I did.

Q: Do you recall what the conversation was about?

A: I do.

Q: Could you tell this Court what it was about?

MS. SULLIVAN: I'm going to object. That would be hearsay, anything that Trooper McKenzie says. He's outside ready to testify.

THE COURT: Sustained.

BY MR. JOHNSON:

Q: Could you tell us if you asked Trooper McKenzie for any assistance or advice?

A: I asked him for advice.

Q: Can you tell us what the subject matter was of your request for advice?

A: The subject matter was what was I to do with the car as far as finding money in the car; who would I contact, and what procedure should I follow.

Q: So it's your testimony, sir, that you asked him about the car and the money?

A: That's right.

Q: And if Trooper McKenzie testified that you asked him only about the money procedures, would he be incorrect on that?

MS. SULLIVAN: I'm going to object. That's calling for the witness to speculate.

MR. JOHNSON: Your Honor, I suggest that's proper predicate to impeach another witness.

THE COURT: Overruled.

BY MR. JOHNSON:

Q: Do you understand the question, sir?

A: Would you restate it again, please.

Q: If Trooper McKenzie were to take this stand under oath and testify that the only thing you asked him about was procedures to deal with the money —

A: Right.

Q: — would he be incorrect?

A: No, he wouldn't.

Q: And so in light of that, what you asked Trooper McKenzie about was what, sir?

A: The money.

Q: The money.

A: Okay.

Q: You didn't ask him about the inventory, did you?

A: No, not inventory of the car.

Q: Just what to do with the money?

A: That's right.

Q: Right. Okay. And I understand that as a result of your conversation with Trooper McKenzie you called your dispatcher.

A: I did.

Q: And what did you ask your dispatcher?

A: To get in touch with my supervisor.

Q: And what was the purpose of that inquiry?

A: To find out what procedures to follow as far as the money and the vehicle.

Q: All right. The money and what?

A: The vehicle.

Q: All right. So you asked someone else about both?

A: Right.

Q: Did you make it - your supervisor?

A: Right.

Q: Did you make any inquiry about if that much money was of any significance as far as being probable cause for anything when found in a car?

A: I did.

Q: And what did you do as a result of the conversation that you had?

A: As a result of the conversation, advised by my supervisor, I was told to go ahead and tow the car, and that, you know, more or less the money was irrelevant to the situation at the time.

MR. JOHNSON: Your Honor, could I approach the witness and refresh his recollection with the deposition?

THE COURT: Yes.

MR. JOHNSON: Your Honor, may I attempt to clarify from here before that?

THE COURT: Yes.

BY MR. JOHNSON:

Q: I believe your testimony, sir, is that your dispatcher told you to tow the car.

A: As advised by the supervisor, yes.

Q: Didn't he say that if you thought the guy was DUI to tow the car?

A: That's right.

Q: So it wasn't just tow it, you had to make a decision before you could decide to tow it, is that correct?

A: That's right.

Q: All right. Which was whether Mr. Wells was DUI?

A: That's right.

Q: And you had already decided that?

A: I had.

Q: All right. Now, did you talk to McKenzie about whether or not the car should be towed?

A: I did.

Q: And he didn't offer anything contrary to what you had gotten from your dispatcher, did he?

A: That's right, only his opinion that it should be.

Q: All right. But the bottom line is that it was your decision whether to have the car towed?

A: That's right.

THE COURT: Mr. Johnson, excuse me for interrupting you, but I quite frankly fail to see what purpose is served by inquiry of this witness as to these facts in view of the stipulation by the State, and in view of the fact that you have already deposed this witness and his deposition is of record. What further purpose is served here?

MR. JOHNSON: Will the State Attorney, Your Honor, stipulate the deposition into evidence as far as for appeal purposes, if there is an appellate matter to be heard?

MS. SULLIVAN: Sure, I will stipulate it in.

MR. JOHNSON: If I might cover one or two other brief matters on this point, we can move on rapidly with that stipulation.

THE COURT: Are these matters which are not contained in the deposition?

MR. JOHNSON: Well, has the Court read the deposition?

THE COURT: I will.

MR. JOHNSON: All right.

THE COURT: I have not yet, but if these aren't matters that are contained in the deposition, fine, a useful purpose would be served. If they are that which was contained within the deposition, then there's no point in going into them here.

MR. JOHNSON: All right. There is testimony in the deposition I would like to ask one question to clarify that so that the areas I'm referring to aren't open for interpretation. I think Mr. Adams could straighten out one area in particular.

THE COURT: Proceed.

BY MR. JOHNSON:

Q: After you had received the consultation from more experienced officers, Mr. McKenzie and your supervisor, you made the decision to tow the car?

A: I did.

Q: That decision was yours and yours alone, is that correct?

A: That's right.

Q: And once you consulted with them you didn't have to consult with anyone else, and you didn't is that correct?

A: That's right.

MR. JOHNSON: All right. Now, if I might ask a leading question I can skip about fifteen predicate questions to get to where I want to go, Your Honor.

THE COURT: Is it leading to information other than that which is in the deposition?

MR. JOHNSON: No, sir, it's simply to lay the predicate for where I want him to be, and understanding what we're getting ready to talk about.

THE COURT: No, sir. Is where you're wanting him to be and understanding what you're getting ready to talk about a matter which is within or without the deposition?

MR. JOHNSON: Yes, sir, it is a clarification question on one point that may be open for —

THE COURT: How about looking at the deposition and refer me to the point that you're making, and let me read that particular point, and then I can tell you whether or not it needs clarifying.

MR. JOHNSON: Just a minute. Page 60, Your Honor.

THE COURT: All right.

MR. JOHNSON: From the question at line 7 through the answer on line 16, Your Honor.

If the State is prepared to stand by that I will not ask any questions whatsoever concerning it.

THE COURT: I don't see where that needs clarifying. It stands for itself.

MR. JOHNSON: All right, sir.

BY MR. JOHNSON:

Q: Trooper Adams, a couple things I haven't asked you in deposition that I'd like to go into if I could.

How many times have you performed an arrest where you had a car towed for inventory purposes?

A: You need a numerical figure?

Q: Well, if you could refer to prior to February the 11th wherein you were the officer who made the decision, and if you could give us the low number and the high number; in other words, a minimum and a maximum if you don't feel comfortable with a specific number.

A: That's hard. I'd say maybe fifteen, twenty.

Q: Prior to February?

A: Right.

Q: And your SOP in those cases would have been the same as it was in this case?

A: As always.

Q: What was the traffic like on 207 that night?

A: At that particular time of the night traffic would be light.

Q: All right. But on that specific night was it also light.

A: Yes.

Q: Okay. Trooper Adams, when you placed Mr. Wells under arrest it's my understanding you returned to K & S for purposes of doing an inventory, is that correct?

A: That's correct.

Q: Now, can you tell us briefly about from the time you arrived until you and whoever got there went out to the car that was going to be inventoried? I don't believe we covered that in the deposition. Can you tell us the interaction between you and whoever you met there?

A: I met the wrecker drivers there in the yard.

Q: Just a minute. You met the wrecker drivers there in the yard?

A: That's right.

Q: Two?

A: Two of them.

Q: Have you seen them here today?

A: I have.

Q: Are they both seated outside?

A: They are.

Q: One gentleman is known as Hoss, the other one known as William Kennedy?

A: I do not know their names.

Q: Were they the two gentlemen that came in with you to be sworn in other than Trooper McKenzie?

A: The larger and the small, yes.

Q: Those were the two drivers?

A: Yes.

Q: And you met them in the yard there at K & S?

A: That's right.

Q: All right. And then what happened.

A: And from there the larger one gave me the keys to the vehicle. We went over and opened it up, that's opened the doors of the car, and I began to do the search.

Q: What about the trunk, did you open the trunk?

A: The trunk was the last thing opened.

Q: The trunk was the last thing opened?

A: Right.

Q: Before you got over to the car, when you were speaking with the larger fellow and the smaller fellow, did you ever say anything to either one of them about marijuana?

A: When I opened the —

Q: Oh, no. Before y'all approached the car you had a conversation with Hoss and with William right there in the yard, according to you, correct?

A: I did.

Q: Did you say during the course of that conversation, at any time, anything about marijuana before y'all got over to the car?

A: If I did I can't recall it.

Q: Well, let me see if I can ask you a specific and refresh your recollection. Did you ask — did you tell either one of those gentleman that —

MS. SULLIVAN: I'm going to object. You're on direct examination, and I think it's covered in the deposition, and I don't think it's relevant.

MR. JOHNSON: No, this is not covered in the deposition.

MS. SULLIVAN: But —

MR. JOHNSON: I understand the Court's ruling.

THE COURT: Let her finish her objection.

MR. JOHNSON: Yes, sir.

MS. SULLIVAN: Judge, I'm just going to — you know, asking him did he ever tell anybody this, that or the other, he's already answered. He's already said, I don't remember what happened in February, in effect. And asking whether or not he said it is just wasting the Court's time.

MR. JOHNSON: Sir, I didn't hear anything about the fact that he didn't remember what happened in February.

THE COURT: I've already admonished Counsel not to inquire of any matters contained within the deposition, and I expect him to abide by that admonition. If he says this is not, then I'll go with that.

Go ahead, Mr. Johnson.

BY MR. JOHNSON:

Q: Your recollection is did you or did you not make a statement concerning marijuana being in that car to those two fellows before y'all ever opened anything in the car?

A: My statement is I don't recall it if I did.

Q: Is that the type of comment that would be significant to the point that you would remember it if you said it, sir?

A: In a petty conversation between us and them at the time I would think very little of it as far as being something major, as far as remembering.

Q: It's not significant then, is that it?

A: During the course of our conversation I didn't think it was, if it was said at all.

Q: Were you looking for marijuana when you took the keys from Hoss?

A: When I took the keys from Hoss I was inventorying the car as procedure that I'm supposed to follow.

MR. JOHNSON: Your Honor, I would respectfully suggest that is not responsive to my question.

THE COURT: I would say that it is responsive.

MR. JOHNSON: All right.

BY MR. JOHNSON:

Q: Your testimony is that the last thing you opened was the trunk, is that right?

A: That's right.

MR. JOHNSON: Your Honor, on page 45 under the same predicate as to the deposition.

BY MR. JOHNSON:

Q: Do you recall me asking you this question and you giving this response when I took your deposition:

"Question: The first thing you did when you got there was open the trunk?

"Answer: Right.

"Question: Then you opened the doors?

"Answer: Right."

Do you recall giving those answers to those questions at your deposition?

A: I do.

Q: Are they contradictory to what you just testified to here today?

A: I imagine they are.

Q: Now, could you tell us which is correct, or do you have a recollection now that's refreshed as to what was opened first for this, quote, inventory?

A: I guess the trunk was opened first.

Q: All right. Did you look in the trunk first?

A: We opened the trunk and that was it, what was in the trunk, oil cans and a suitcase.

Q: What?

A: A couple oil cans, an oil can, a can of oil or something like that, and a suitcase.

Q: Is that when you took the suitcase out of the trunk?

A: No.

Q: When did you take the suitcase out of the trunk?

A: We took the suitcase out of the trunk after I had went through the car.

MR. JOHNSON: Could I have a moment, Your Honor?

I have no further questions of this witness.

THE COURT: Do you have anything to inquire of him, Madam State Attorney, other than that which is in the deposition?

MS. SULLIVAN: I have one point, Your Honor. It is contained in the deposition, parts of it.

THE COURT: Contained in the deposition?

MS. SULLIVAN: Yes, sir, it is, but I would like to inquire of the witness with the Court's indulgence. If the Court doesn't want me to, I won't.

THE COURT: Refer me to the page of the deposition.

MS. SULLIVAN: Yes, sir. It goes to the issue of consent of this Defendant, consent that he gave the officer.

MR. JOHNSON: Excuse me, Your Honor —

THE COURT: Refer me to the page of the deposition.

MR. JOHNSON: — I don't want the State to suggest any answers to the witness by way of proffer. If we could do this at side bar.

THE COURT: No, we'll go ahead here. All I want her to do is tell me the gage and I'll read it, and then I can tell whether she needs clarification.

MS. SULLIVAN: Okay. Page 70, line 19, 20, 21, 22, 23, 24, 25.

THE COURT: I don't see any problem with that. It's quite clear to me.

MS. SULLIVAN: Okay. And one more point that I would like to make that is not in the deposition.

MR. JOHNSON: Point or question?

MS. SULLIVAN: Question.

THE COURT: Not in the deposition. Go ahead and ask it.

MS. SULLIVAN: No, sir.

CROSS-EXAMINATION

BY MS. SULLIVAN:

Q: When the Defendant —

MS. SULLIVAN: Well, it might be in the deposition:

BY MS. SULLIVAN:

Q: When you saw the three thousand dollars laying on the floorboard of the car, or the sume [sic] of money that you did not know what it was at that time, was the Defendant under arrest at that time?

A: He was.

MS. SULLIVAN: That's all.

THE COURT: Okay. You can come down, Trooper Adams.

Now, Mr. Johnson, if you will, I believe that each of the other witnesses that you have scheduled today have been deposed, is that correct?

MR. JOHNSON: Your Honor, yes, sir, and I will more than happily agree to stipulate their deposition into the official Court record, and have the Court peruse those at the Court's time.

THE COURT: All right. Is there any live testimony from either of them with the fact that the depositions are on record, and if they're stipulated in?

MR. JOHNSON: Your Honor, only this: For purposes of the record, one of the drivers would have some directly contradictory testimony to what was testified to from the stand, but his testimony in the deposition is clearly contradictory to what was testified to —

THE COURT: Then there's no point in him testifying here. See, you can argue that.

MR. JOHNSON: Yes, sir.

THE COURT: All I'm trying to do is avoid being redundant.

MR. JOHNSON: I understand that. I was not — I thought the Court would want to rule after the hearing was the reason I wanted to put it all on. I can see that you want to do it at a later time. So we can do arguments at a later time, if the Court likes.

THE COURT: I'll rule by tomorrow.

MR. JOHNSON: All right, sit.

THE COURT: At the latest. You know, if I can rule today I will, but I'll rule by tomorrow.

MR. JOHNSON: At the Court's leisure. At the Court's leisure.

THE COURT: Well, I've got the rule sometime prior to Monday.

MR. JOHNSON: Sunday will be all right with us.

With the stipulation that Trooper McKenzie, Grover Qentin Bryan and William Kennedy's depositions will come in as part and parcel of the official record of these proceedings we would have nothing further to put on, Your Honor.

THE COURT: Ms. Sullivan.

MS. SULLIVAN: I would like to have Trooper McKenzie take the stand. He's going to testify about matters not contained in his deposition. I did not ask any questions on the deposition.

THE COURT: Are these matters relevant to the Motion to Suppress?

MS. SULLIVAN: Yes, sir, they're highly relevant.

THE COURT: Tell me what they would be.

MS. SULLIVAN: Trooper McKenzie is going to testify as to consent. He heard this Defendant give Trooper Adams consent to check in the trunk. That is not contained in the deposition, and I think that's very —

THE COURT: I don't think that's —

MS. SULLIVAN: Well, from what I'm gathering from the Defense case, they're trying to show that Trooper Adams is not a credible witness. This is what I'm gathering from the Defense. Therefore, I think if I can have a corroborative witnesses that he heard this Defendant give trooper Adams consent to look inside the car, go ahead, or the trunk, no problem.

MR. JOHNSON: Your Honor, we will stipulate —

THE COURT: Well, it really would appear to me that the thrust of the Defense argument here is as contained in motions, as contained in his memorandum, statement of facts, and as indicated by the line of questioning that he made of the witness, is that the trooper's main interest was not inventorying, but searching for contraband.

Now, under the doctrine as laid down by the Supreme Court of Florida, and the cases cited by Mr. Johnson in his memorandum, if that was the primary purpose, then the search must fail. If that was not the primary purpose, and it was in fact an inventory search, then the search would be valid as far as that point was concerned.

Now, is that not the thrust of your argument?

MR. JOHNSON: That's one of the thrusts.

THE COURT: Yeah, I understand, but that's — to counter what she's saying here —

MR. JOHNSON: I'm prepared to stipulate to what she wants to put McKenzie on for. I'm prepared to stipulate that our client, Mr. Wells, gave her permission at the roadside for Trooper Adams to look in the trunk.

THE COURT: That's contained within the face of your motion also.

MR. JOHNSON: Yes, sir.

THE COURT: Now, I don't see what point would be served by calling Trooper McKenzie to testify.

MS. SULLIVAN: Trooper Adams is the one that's contained in the face of the motion, Your Honor, not Trooper McKenzie.

THE COURT: No, you said Trooper McKenzie would testify as to the consent.

MS. SULLIVAN: Right.

THE COURT: But, you see, Mr. Johnson has not, even in his Motion itself, contested that, that Mr. Wells gave that consent.

MS. SULLIVAN: Right.

THE COURT: I don't see what purpose would be served by having McKenzie come and bolster what Adams said in that regard.

MS. SULLIVAN: Then I won't bring him on, Your Honor.

THE COURT: All right.

MS. SULLIVAN: I'm not prepared to stipulate, however, to the depositions of Clinton Bryan or the deposition of William Kennedy.

THE COURT: Why; were you not present at the taking of them?

MS. SULLIVAN: I was present, Your Honor, but they're packed with hearsay, just complete and absolute hearsay.

THE COURT: I think I'm —

MS. SULLIVAN: I can't even —

THE COURT: Having been trained as you were, Counselor, in the law of hearsay, I think I'm quite capable of excluding hearsay testimony in the reading of a transcript. You know, I read them every day.

MS. SULLIVAN: Yes, sir, I'm well aware of that.

MR. JOHNSON: The Defense would agree with that.

THE COURT: If you were there, I really don't even need a stipulation from Counsel as far as the use of the depositions as evidence in the hearing on a Motion to Suppress. Counsel for the Defense is entitled to submit it based on matters of record. And they are record.

MS. SULLIVAN: Okay.

THE COURT: So I don't see any point which would be served, and I think all we're going to do is delay the Court's ruling. And my suggestion is let's get your argument in and dismiss these witnesses, and let's get on down the road with it.

MR. JOHNSON: Your Honor, we would stand — based on the Court's ruling we would have nothing further to present by way of evidentiary matters.

THE COURT: All right. You can dismiss these witnesses, Mr. Bailiff.

MR. JOHNSON: Your Honor, one housekeeping matter. One of the witnesses, Mr. Kennedy, is under subpoena for next Monday, and is in Lakeland now. Do you want to address that to him, or get a number where he can be reached? It may or may not be necessary to go to trial, but I'm not going to let him out of the subpoena.

THE COURT: Get Kennedy in here, and let Counsel get the information they need from him without putting him on as a witness.

(Short recess.)

THE COURT: All right. I'll hear any argument you may wish to make. And I don't see any sense in going into something — you know, you've put forth a pretty good argument in your memorandum.

MR. JOHNSON: Your Honor, I was going to say we'll stand on the argument set forth in the memorandum.

THE COURT: Ms. Sullivan.

MS. SULLIVAN: And the State's position on that is that it was not an inventory search, that it was consensual search. I have case law to the effect, *Bond v. State*. And I'll supply the Court with copies of it.

THE COURT: Do you have copies for Mr. Johnson?

MS. SULLIVAN: No, I will give them to him.

MR. JOHNSON: We'll be glad to get them afterwards, Your Honor.

THE COURT: All right. Well, go ahead and present them to the Court.

MS. SULLIVAN: And it says what the officer believed at the time he's effectuating the search is not depositive of the type of search that it is; that if it is a valid search by, in effect, any other means that it is a valid search. And that's *Bond v. State*, that's a Second DCA Court case, 431 So.2nd, 343.

THE COURT: All right. Give me a copy of the opinion then.

MS. SULLIVAN: Yes, sir. And I also have — I'd cite *New York v. Belton, U.S. v. Roth*. I don't know if those are cited in the memo, I don't recall.

And I would cite *Florida v. Wargin*, which is 418 So.2nd, 1261, and that is an issue that has not been raised by Counsel. If you consent to search of compartment, any compartment found within that compartment is also presumed to be a consensual matter.

MR. JOHNSON: That's all is Roth?

MS. SULLIVAN: Yes, that expands Roth to consent searches.

MR. JOHNSON: I understand.

THE COURT: *U.S. v. Roth*, is that 102 Supreme Court, 2157?

MS. SULLIVAN: Yes, sir. We have a copy of that for the Court.

MR. JOHNSON: We've supplied it in our materials to the Court.

THE COURT: All right.

MS. SULLIVAN: Let's see. I think I've got one or two more cases.

I'd cite — I don't have the case cite on it, I've got — it's 9 *Florida Law Weekly*, 1324, Third DCA opinion, June of '84.

THE COURT: Name of the case?

MS. SULLIVAN: *State versus Martinez.* And that says that even if a stop is unlawful, if an individual consents to a search of an automobile or luggage, or anything, then that consent is valid and is not tainted by the ensuing doctrine.

THE COURT: Do you have a copy of the *Florida Law Weekly* opinion?

MS. SULLIVAN: Yes, sir, I have a copy.

THE COURT: All right. Well, give those to me, and we'll go from there. All right. Do you have them with you now?

MS. SULLIVAN: No, sir, I don't I've got —

THE COURT: How quickly can you get those copies upstairs?

MS. SULLIVAN: I can go down to my office.

THE COURT: All right. Well, give any of those that Mr. Johnson has not been furnished, or he hasn't furnished me. If y'all go back down to your office and make the copies and get them and bring them up here to me, then I'll be reading the depositions, and we'll see if we can't go ahead and make a ruling on it. I'll read the depositions and the cases that you cite.

I'm familiar with most of the cases that you've cited.

MR. JOHNSON: I didn't doubt that, Your Honor.

THE COURT: It's just one of these things we deal in all the time, you know, one of these things we have to be familiar with.

MS. SULLIVAN: Do you require a copy of *New York v. Belton,* or do you have that already?

THE COURT: Well, I have it available to me upstairs. I don't actually have those books in my office, but we have all of the *Supreme Court Reporters* up in the Law Library, as you well know.

MR. JOHNSON: We're familiar with *Belton,* and certainly don't object.

THE COURT: I am familiar with *Belton.*

All Right. If you'll get me those then we'll go forward.

MR. JOHNSON: Your Honor, a housekeeping matter.

THE COURT: Yeah.

MR. JOHNSON: Negotiations were kept open until tomorrow. I assume we'll have them until five o'clock tomorrow?

THE COURT: I'll leave them open until after I rule on this.

MR. JOHNSON: Thank you, sir.

(And no further proceedings were had.)

CERTIFICATE

STATE OF FLORIDA COUNTY OF PUTNAM

I do hereby certify that the foregoing pages represent a true and correct transcription of my Stenotype notes taken at the time and place aforesaid.

_____

TERRY T. HURLEY
Deputy Official Court Reporter

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

PROCEEDINGS before the Honorable Robert R. Perry, Circuit Judge, taken at the Putnam County Courthouse, Palatka, Putnam County, Florida, on Tuesday, the 29th day of October, 1985, as reported by Terry T. Hurley, Deputy Official Court Reporter.

APPEARANCES:

MAUREEN SULLIVAN, Esquire
Assistant State Attorney

HUNTLEY JOHNSON, Esquire
Attorney for Defendant

THE COURT: *State of Florida versus Martin Leslie Wells.* 85-167. This cause coming on this date to be heard before and me and you and the Defendant, Martin Leslie Wells, being now present before me represented by Mr. Huntley Johnson, your attorney of record, having entered a plea of no contest to the offense of the possession of a controlled substance, I want to give you an opportunity at this time to offer any matters which you may have either in legal bar or preclusion of sentence.

MR. JOHNSON: We have nothing.

THE COURT: Or in mitigation thereof.

MR. JOHNSON: We have nothing, Your Honor.

THE COURT: Martin Leslie Wells, no good cause having been shown why you should not be adjudicated guilty, this Court hereby adjudges you to be guilty of possession of a controlled substance

It appears to the satisfaction of this Court that you're not likely again to engage in a criminal course of conduct; that the ends of justice and welfare of society do not require that you should suffer the full penalty authorized by law. Now, therefore, it's ordered and adjudged that the imposition of sentence is hereby withheld, and you're hereby placed on probation for a period of five years under the supervision of the Department of Corrections and it's officers, such supervision to be subject to the provisions and laws of this State.

You'll comply with the eight standard conditions of probation. I have amended, as is my habit, Condition 6 dealing with intoxicants and dangerous substances. Conditions 9, 10 and 11 are now standard for this Court in all probationary orders.

As a special condition of probation you'll pay a thousand dollars fine to the Clerk of this Court as directed by your probation supervisor.

And as a further special condition of probation you'll serve fifty-one weeks in the Putnam County Jail.

You're hereby placed on notice that this Court may at any time rescind or modify any of the conditions of your probation, may extend the period of probation as authorized by law, or may discharge you from further supervision.

If you violate any of the conditions of your probation you may be arrested and this Court may revoke your probation and impose any sentence which is might have imposed before placing you on probation.

When you've completed the incarceration portion of your sentence you'll report to the probation officer, and the assureties on your bond at that time will stand discharged from liability.

The Clerk will file this order in his office, record the same in the minutes of the Court, and provide certified copies to the Probation Office for their use in compliance with the requirements of law. Also copies to the Sheriff of Putnam County.

I have a Motion for Post Trial Release based on the notice of appeal taken in accordance with the plea previously entered to no contest based on my denial of the Motion to Suppress.

MR. JOHNSON: That was Judge Eastmoore's denial, Your Honor.

THE COURT: Judge Eastmoore's denial of the Motion to Suppress.

What is the bond presently set?

MR. JOHNSON: Five thousand dollars, Your Honor.

THE COURT: Secured?

MR. JOHNSON: Yes, sir. He has Mr. Brooks as his bondman, Your Honor.

Your Honor, what I would ask, if I might be heard?

THE COURT: Yes, sir.

MR. JOHNSON: Would be hat the bond which he is now under, which he's made all Court appearances on, be the same one that is appropriate on the supersedeas, and that Mr. Wells be given until Friday to turn himself in to the jail, so that between now and Friday we might make arrangements for that same bond to be applicable as to the supersedeas.

I've spoken to Ms. Sullivan and Mr. McLeod from the State Attorney's Office, and they have indicated to me that they are not opposed to that, Your Honor.

THE COURT: What says the State?

MS. SULLIVAN: We are not opposed to a five-thousand-dollar supersedeas bond, if that is what the Court is going to impose. We are not opposed to the Defendant remaining free upon bail as well, sine he has shown up for everything.

MR. JOHNSON: By the way, Your Honor, he wishes for me to apologize for him for being late. There was a hurricane between here and St. Augustine.

THE COURT: That is not a problem.

MR. JOHNSON: Yes, sir.

THE COURT: The weather has been somewhat inclement, and I don't have any problem with that.

I'll grant the Motion to Supersedeas in the amount of five thousand dollars secured. I will defer the imposition of the incarceration portion of the sentence until Friday afternoon at five o'clock in order to give you an opportunity to be sure that the bondsman has no problem with his remaining free on the same bond.

I certainly don't have any problem with that if the bondsman is agreeable. Simply have him file a certificate in the Court file, and that will take care of it. I don't see why he should have to pay another premium for the bond.

MR. JOHNSON: If there is a problem we'll attempt to secure another bondsman.

THE COURT: Well, if there is a problem with the bondsman staying on his bond, then all you have to do is secure another one, but I would hope he wouldn't have to pay another premium.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: That is not appropriate under the circumstances.

You'll need to take his fingerprints, Captain Johnson.

If the bond has not been posted, Mr. Wells, report to the Sheriff at five o'clock on Friday afternoon. I would assume the bond can be done through the same bondsman.

MR. JOHNSON: Yes, sir. Thank you, Your Honor.

THE COURT: All right.

(And no further proceedings were had.)

CERTIFICATE

STATE OF FLORIDA COUNTY OF PUTNAM

I do hereby certify that the foregoing pages represent a true and correct transcription of my Stenotype notes taken at the time and place aforesaid.

_____

TERRY T. HURLEY
Deputy Official Court Reporter

CERTIFICATE

STATE OF FLORIDA, COUNTY OF PUTNAM,

I, EDWARD L. BROOKS, Clerk of the Circuit Court for the County Putnam, State of Florida, do hereby certify that the foregoing pages 197 to 274 inclusive contain a correct transcript of the record in the case of MARTIN LESLIE WELLS VS. STATE OF FLORIDA and a true and correct recital and copy of all such papers and proceedings in said cause as appears from the records and files of my office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 25th day of November, 1985.

EDWARD L. BROOKS
Clerk of the Circuit Court for
Putnam County
By /s/ Jeanette S. King
Deputy Clerk

IN THE CIRCUIT COURT OF
FLORIDA, SEVENTH
JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO. 85-167-CF-J

STATE OF FLORIDA

vs.

MARTIN LESLIE WELLS,

Defendant.

PROCEEDINGS before the Honorable Robert R. Perry, Circuit Judge, taken at the Putnam County Courthouse, Palatka, Putnam County, Florida, on Monday, the 12th day of August, 1985, as reported by Terry T. Hurley, Deputy Official Court Reporter.

APPEARANCES:

MAUREEN SULLIVAN, Esquire
Assistant State Attorney

HUNTLEY JOHNSON, Esquire
Attorney for Defendant

THE COURT: All right. Madam Reporter, we're here in the case of State of Florida versus Martin Leslie Wells, 85-167. This is a one Count Information of the unlawful possession with the intent to sell or deliver a controlled substance.

What says the State of Florida, are you ready for trial?

MISS SULLIVAN: Yes, sir.

THE COURT: What says the Defense?

MR. JOHNSON: Your Honor, we are ready for trial also, but we have a negotiated plea that we've entered into with the State if it's acceptable with the Court.

THE COURT: Tell me what it is.

MR. JOHNSON: That plea being a plea to nolo, specifically reserving the right to appeal the issue of the Suppression Hearing that we had last Thursday, pleaing to the lesser included offense of possession of more than twenty grams of marijuana, a third degree felony, as opposed to a second degree felony.

Judge Eastmoore had left open negotiations until after the hearing. Those were the negotiations that we had entered into.

THE COURT: Is that plea acceptable to the State? I don't have any problems with the nolo plea at all, because I understand that you wish to appeal the Suppression Hearing. What I have a problem with is the nolo plea to the lesser included offense.

MR. JOHNSON: That has been Mr. McLeod and I's, and Maureen and I's discussions for about the past six weeks, Your Honor, as to the fact that that was going to be the plea. This is not a surprise to anyone.

MISS SULLIVAN: I don't have any problem with the plea, Your Honor. I do ask on the record that Mr. Johnson stipulate as to the factual basis so that the State doesn't have to present witnesses on a no contest plea.

THE COURT: Can we agree on the presentation of facts by statement of counsel rather than the bringing of witnesses?

MR. JOHNSON: Upon hearing them I'm certain I can agree to them, Your Honor.

THE COURT: All right.

MR. JOHNSON: A priori I wouldn't want to, but upon hearing them I'm sure they will be agreeable.

THE COURT: All right. Well, on nolo pleas, as you know, you have to bring a certain burden of proof, and that can be met either by statement of counsel or by bringing the witnesses themselves.

MR. JOHNSON: Yes, sir. My point is I have certainly no problem with stipulating to the factual basis upon hearing it. It may be that we might need to discuss it somewhat, but I don't anticipate that, and have no problem stipulating to it whatsoever. And I will be glad to present the factual basis and see if it's agreeable to the State, whatever the Court's preference on that.

THE COURT: All right. I'm willing to accept it. Place the Defendant under oath.

(The Defendant was duly sworn.)

THE COURT: Mr. Wells, if you plead no contest I'm going to ask you some questions about the offense to which you've pled. If you answer those questions under oath, on the record, here in the presence of your attorney, your answers if they are untrue for any reason may later be used

against you in a separate prosecution for perjury, which is a separate felony crime. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You are Martin Leslie Wells?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Wells, you have through your attorney announced to the Court that you desire to enter a plea of guilty to the charge of possession of a controlled substance, to wit, marijuana in excess of twenty grams.

It is your right to plead guilty to this — to plead no contest to this charge. However, before this Court may accept your plea it is necessary that the Court find that your plea is made freely and voluntarily. Therefore, I'm going to ask you certain questions. If you do not understand the questions or the words that I use, please ask me to explain or repeat any questions or any statements, and you may of course consult with your attorney about any matter whatsoever during the questioning. Are you with me so far?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you've tendered a plea of no contest to the crime of the unlawful possession of a controlled substance, that is cannabis in an amount in excess of twenty grams, which is a third degree felony in this State.

The maximum possible penalty is five years imprisonment in the State Prison, and a five-thousand dollar fine, or both imprisonment and a fine, or the Court in its discretion may sentence you to a lesser term of years, impose a lesser fine, or you may be considered for probation.

You are to understand, however, that I am not promising you probation. I'm not promising you any particular term of years, nor the imposition of any particular fine. This

is simply the range of sentencing alternatives which are available to this Court at a sentencing hearing in your case, after we have a pre-sentence background investigation done on you, and after we know a lot more about your background, the nature and circumstances of this particular offense. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you, Mr. Wells?

THE DEFENDANT: Thirty-one.

THE COURT: Are you married at this time, or have you ever been married?

THE DEFENDANT: I'm not presently, but I have been.

THE COURT: Do you have others dependent on you other than yourself for support?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Who are they?

THE DEFENDANT: My two children from my ex-wife.

THE COURT: All right, sir. How much schooling or education do you have?

THE DEFENDANT: High school.

THE COURT: What kind of word do you do?

THE DEFENDANT: I'm a mechanic.

THE COURT: Automobiles, airplanes, boats, what?

THE DEFENDANT: Automobiles and boats.

THE COURT: All right, sir. Have you ever been treated for any type of mental illness?

THE DEFENDANT: No, sir.

THE COURT: To your knowledge, do you suffer from any mental or emotional disabilities at this time?

THE DEFENDANT: No, sir.

THE COURT: Are you under the influence at this time of any intoxicants or drugs or medications that would affect your understanding of these proceedings?

THE DEFENDANT: No, sir.

THE COURT: Have you taken any drugs, medication, or intoxicants within the last twenty-four hours that would cloud your mind and prevent you from understanding what's happening here today?

THE DEFENDANT: No, sir.

THE COURT: Mr. Wells, you have a right under our system of law to plead not guilty to this charge, and you cannot be compelled to testify against yourself. You may remain absolutely silent.

You have the right to a trial by jury as to your guilt or innocence, and at the trial to have the assistance of an attorney.

During the trial you have a right to confront, that is to see and hear the witnesses who will testify against you at the trial. And you are entitled to subpoena and compel the attendance of witnesses, and have witnesses present to testify and present evidence in your behalf.

If you should elect to plead not guilty, then before you could be convicted the State will have the duty of proving your guilt beyond and to the exclusion of every reasonable doubt. However, if you plea of no contest is accepted you will

waive, that is you'll give up each and everyone of these very important Constitutional rights.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, Mr. Wells, a plea of guilty admits the truth of the charge made against you, a plea of not guilty denies the charge made against you, a plea of no contest admits the facts for the purpose of this case, and it says to me that you do not choose to defend.

For the purposes of this case a plea of no contest will have the same legal affect as a guilty plea.

Now, has that been explained to you by your attorney, and do you understand the difference between the pleas of guilty, not guilty, and no contest?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you plead no contest you give up your right to appeal all matters relating to the judgment of this Court, especially including the issue of your guilt or innocence. You do not, however, give up your right to appeal any matter which might invalidate your plea of guilty, or which might invalidate your sentence. Nor do you give up your right to review by an appropriate collateral attack on the Constitutional jurisdiction of the Putnam County Circuit Court to try and to dispose of your case.

You are specifically reserving your right to appeal, but basically the question of your guilt or innocence is going to be decided here today if I accept this plea, and will be non-appealable from this day forward, except for that reservation on the suppression of evidence.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. If you plead no contest there will be no further trial with a jury on the merits of this case, because by your plea of no contest you waive your right to that trial.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about anything I've said or any questions I've asked of you so far?

THE DEFENDANT: No, sir.

THE COURT: Do you now acknowledge that your plea of no contest is in your best interest, even though you maintain your innocence of these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Has any person anywhere assured you or led you to believe that you'll be placed on probation or be given a light sentence, or otherwise rewarded for pleading no contest?

THE DEFENDANT: No, sir.

THE COURT: Has any person anywhere made you any promises to get you to plead no contest?

THE DEFENDANT: No, sir.

THE COURT: Has any person anywhere used any type of threats, force, pressure, violence, or intimidation — other forms of intimidation to make you plead no contest?

THE DEFENDANT: No sir.

THE COURT: You're here represented by Mr. Huntley Johnson, who sits here with you. Have you discussed your

case fully with him, and explained everything you know about it to your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: And has your attorney explained and discussed with you the legal defenses that may be available to you on this charge?

THE DEFENDANT: Yes, sir.

THE COURT: Now, Mr. Wells, I'm going to ask the Prosecutor to tell me the facts that the State would be prepared to prove at the trial of this case. I want you to listen carefully to what she says, because I'm going to ask you some questions about what she tells me.

Madam Prosecutor.

MISS SULLIVAN: Yes, sir. The state is prepared to prove that on or about the 11th day of February, 1985, within Putnam County, Florida, Martin Wells did then and there unlawfully have in his possession or under his control a Schedule 1-C controlled substance, to wit, cannabis in an excess of twenty grams.

Basically, Your Honor, the State would prove that Mr. Wells was travelling down 207 in Putnam County, Florida, when he was pulled over by Trooper Rodney Adams with the Florida Highway Patrol.

He was pulled over for excessive speed. Upon talking with the Defendant at that time Trooper Adams noticed an odor of an alcoholic beverage on his breath, and administered the field sobriety tests, which in Trooper Adams' opinion this Defendant failed.

Trooper Adams was taking him down to the Florida Highway Patrol Station to blow into the breath verifier when the Defendant asked him could he get his jacket.

He went back to the car to get the jacket, both of them went, and laying on the floor in plain view was $3000 in cash. At the time Trooper Adams did not know that it was $3000 in cash, but a large amount of cash was on the driver's side floorboard.

Subsequent to that Trooper Adams asked if he could search the trunk. No one could open the trunk of the car. The car was towed. The Defendant was arrested and processed.

Meanwhile, Trooper Adams went back to the tower's towing station. The trunk was opened. There was a suitcase inside the trunk. The suitcase was pried open. When it was pried open they found a large green baggie in the trunk which contained cannabis.

The State can put on the testimony of Glenn Abate, he's an FDLE lab analyst, and he will say that the green leafy material found inside the trunk was cannabis.

MR. JOHNSON: I stipulate to that.

MISS SULLIVAN: Okay. And that there was 7050 grams of cannabis.

Furthermore, the State is prepared to put on the testimony of John C. Wilson, he's a latent fingerprint analyst, and he will say that they found the known palm print of Martin Wells on the green bag in which the cannabis was wrapped. And he can say that that with a certainty that those were the prints of Martin Wells.

And the car that the Defendant was driving belonged to John Turner, but at the time he was exercising his dominion and control over the vehicle, and he had the keys to the trunk.

Those are the facts the State would present, Your Honor.

THE COURT: Mr. Wells, any exceptions or objections to the facts as recited by the Prosecutor?

MR. JOHNSON: Yes, Your Honor, if I might speak for Mr. Wells.

THE COURT: Yes, sir.

MR. JOHNSON: Only for purposes of clarifying the record, it's my understanding that the owner's name is Joe Turner, number one. Number two, I think that the chronology was slightly off as to when Mr. Wells was placed under arrest. And in all fairness to the State, Mr. Wells has been placed under arrest prior to the viewing of the money, and prior to the attempts to get into the trunk.

I know that Miss Sullivan is aware of that, but the manner in which she delivered it on the record will not appear chronologically as it happened based on the evidenced adduced.

It's not important to us, other than to clarify the records for both parties, Your Honor.

THE COURT: All right, sir.

MR. JOHNSON: I would also, for the sake of saving your division, let you know that eighteen pounds would be the equivalent of seven-thousand, whatever number of grams.

THE COURT: All right, sir. Any other exceptions or objections?

MR. JOHNSON: No, sir.

THE COURT: All right. You understand, Mr. Wells, that by pleading no contest you are giving up all legal defenses to this charge?

MR. JOHNSON: Other than the reservation.

THE COURT: Other than the reservation with regard to the Motion to Suppress.

MR. JOHNSON: Yes, sir. That confused him.

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with your attorney and the way he's represented you in the case?

THE DEFENDANT: Yes, sir.

THE COURT: He's made a fairly good plea bargain for you. He's plea bargained down from a second degree felony to a third degree in the first instance, and reserved your right to appeal a major portion of your case. I would say that's pretty good plea bargain, wouldn't you?

THE DEFENDANT: I feel very comfortable.

THE COURT: Okay. I would.

Now, Mr. Wells, has anyone coached you or told you to testify other than the truth today because of any agreement or promise or understanding that has not been presented to me here today?

THE DEFENDANT: No, sir.

THE COURT: Nobody's cut you any deals concerning disposition of your case and made you any promises that they haven't brought out to me here this morning?

THE DEFENDANT: No, sir.

THE COURT: Before I accept your plea of no contest let me ask you: Do you understand all that's been said here so far this morning?

THE DEFENDANT: Yes, sir, I think so.

THE COURT: Do you still desire to maintain your plea of no contest?

THE DEFENDANT: Yes, sir.

THE COURT: This Court finds that you, Martin Leslie Wells, are now alert and intelligent, that you understand the nature of the charge against you, and that you appreciate the consequences of pleading guilty.

The Court finds the facts are sufficient to sustain the plea, that your decision to plead guilty — no contest is freely, voluntarily, and intelligently made; that you've had the advice and counsel of a competent lawyer with whom you say you're satisfied.

Your plea of no contest is accepted. The Florida Department of Corrections is directed to conduct a Pre-Sentence Investigation of Martin Leslie Wells, and submit it to this Court at the earliest practicable date.

Mr. Wells, please, if you would, cooperate fully with the Pre-Sentence Investigator. Anything that you want me to know that would help me make a fair and just decision in your case, tell them and they'll tell me.

The Defendant is presently free on bond. Any objection to his remaining free?

MISS SULLIVAN: No, sir.

THE COURT: Special conditions: No alcohol, no mind-altering substances, Mr. Wells, until this is all over with. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

(And no further proceedings were had.)

CERTIFICATE

STATE OF FLORIDA COUNTY OF PUTNAM

I hereby certify that the foregoing pages constitute a true and correct transcription of my Stenotype notes taken at the time and place herein above stated.

_____

TERRY T. HURLEY
Deputy Official Court Reporter.

STATE OF FLORIDA,

Petitioner,

v.

MARTIN LESLIE WELLS,

Respondent.

No. 69,363

Supreme Court of Florida

March 2, 1989

PER CURIAM.

On motion for rehearing by petitioner, we withdraw our prior opinion in this case and substitute the following as the opinion of the Court.

We have for review *Wells v. State*, 492 So.2d 1375 (Fla. 5th DCA 1986), based on express and direct conflict with *State v. Wargin*, 418 So.2d 1261 (Fla. 4th DCA 1982). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in part the decision of the district court below.

While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station

to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review.

1 A test later showed that respondent's blood alcohol content was below the legal limit. *Wells v. State*, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

The facts of this case raise three distinct questions of search and seizure law: the scope of the consent search conducted in this instance, the propriety of opening the locked container found during the automobile inventory search, and the propriety of the impoundment of respondent's vehicle.

The Consent Search

The state urges us to hold that respondent's general consent to open and look into the trunk of the automobile was sufficient to authorize the opening of any locked or closed containers found there. In support of this argument, the state contends that *Wargin* correctly extended the principles of *United States v. Ross,* 456 U.S. 798 (1982), to the consent-search context. We cannot agree.

Ross clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the *Ross* Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01. Based on these facts, *Ross* held: "*If probable cause* justifies the search of a lawfully stopped *vehicle*, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825 (emphasis added).

There was no issue of a consent search in *Ross.* Indeed, the principles that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As *State v. Fuksman,* 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:

> The considerations upon which the holding in *Ross* is grounded do not exist in the consent search

> context where there is no probable cause. If a person consents to the search of a vehicle containing luggage and a search of the *vehicle alone* reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, they officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *Id.* On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but *not* in my trunk."

Thus, we decline to apply *Ross* to consent searches, and, to the extent it conflicts with our opinion today, we disapprove *Wargin.* We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a

warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

We also concur with the district court's conclusion that the consent given in this instance did not permit the police to pry open locked luggage with a knife. Respondent's permission merely indicated that the police could look into the automobile trunk. This was an insufficient basis for the police action that followed.

In so holding, we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.[2]

2 *Ross* itself reached this conclusion when it explicitly distinguished *United States v. Chadwick,* 433 U.S. 1 (1977), and *Arkansas v. Sanders,* 442 U.S. 753 (1979). *See United States v. Ross,* 456 U.S. 798, 811-15 (1982). *Chadwick* had drawn a clear distinction between automobiles, which have a "diminished expectation of privacy," 433 U.S. at 12, and luggage which has "expectations of privacy ... substantially greater than in an automobile." *Id.* at 13. *Sanders* had suggested that a warrant was required to open a suitcase where "it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U.S. at 767 (Burger, C.J., concurring in the judgment). *Ross* reaffirmed this holding, although it rejected some of *Sanders'* analysis. 456 U.S. at 824. If this conclusion applies when the police actually have probable cause to search luggage, it certainly applies when they do not.

As stated in *Chadwick*:

> Once the federal agents had seized it...there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. ... With the footlocker safetly immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis. Our own courts generally have agreed on this principle. *State v. Carney,* 423 So.2d 511 (Fla. 3d DCA 1982) (permission to go aboard boat did not give consent to open hidden compartments and containers therein); *Loftis v. State,* 391 So.2d 219 (Fla. 1st DCA 1980) (defendant's cooperation in opening truck did not give agricultural inspector consent to remove and open taped package), *review denied,* 399 So.2d 1146 (Fla. 1981); *Major v. State,* 389 So.2d 1203 (Fla. 3d DCA 1980) (no consent where defendant opened tote bag for airport officer to look in, but where officer spontaneously reached in and grabbed a nasal inhaler containing contraband), *review denied,* 408 So.2d 1095 (Fla. 1981); *Luxenburg v. State,* 384 So.2d 742 (Fla. 1st DCA 1980) (opening vehicle to agricultural inspector did not authorize him to slit open bag with knife); *Moorehead v. State,* 378 So.2d 123 (Fla. 2d DCA 1980) (consent for officer to look at pool cue did not authorize unscrewing of cue to see what was rattling inside); *Villari v. State,* 372 So.2d 522 (Fla. 1st DCA 1979) (no consent when defendant allowed access to vehicle but asked "Don't you need a warrant" when officers approached containers and luggage); *Ross v. State,* 369 So.2d 447 (Fla. 1st DCA 1979) (no consent when defendant allowed officers to look in camper but apparently denied access to containers); *Raleigh v. State,* 365 So.2d 1048 (Fla. 4th DCA 1978) (no consent where occupants acquiesced to warrantless search of vehicle's trunk where officer opened trunk himself without asking permission).

433 U.S. at 13. Moreover, *Chadwick* expressly noted that the search of the footlocker was a far greater intrusion into interests protected by the fourth amendment than was the mere seizure of the footlocker. *Id.* at 14 n.8.

In the present case, the arresting officer plainly stated that he had no actual consent to open the suitcase found in the automobile trunk.[3] We thus must agree with the court below that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside.[4] *Wells*, 492 So.2d at 1378. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside that container, *Arkansas v. Sanders,* 442 U.S. 753, 765-66 (1979), that is protected under the United States Constitution and Florida's privacy amendment from the

3 The following colloquy with the arresting officer occurred:

> Q: Did [Wells] give you permission to go into the trunk of that car?
>
> A: Oh, yes, no problem, but he said — I said: "Do you mind if I look in your trunk," and he said, "Sure, go right ahead."
>
> . . . .
>
> Q: Now, since [Wells] had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?"
>
> A: No, I didn't.

4 We acknowledge that this case raises an issue as to whether respondent had standing to assert a privacy interest in the luggage itself, since he apparently contended the luggage was not his. *See United States v. Salvucci*, 448 U.S. 83 (1980). (Receding from the "automatic standing" doctrine). We find, however, that the state effectively waived this argument by failing to raise it below, or in this appeal. *See Steagald v. United States*, 451 U.S. 204, 209 (1981). Moreover, respondent unquestionably does have a protected privacy interest in the borrowed car he was driving, which confers standing to challenge both the impoundment and inventory search conducted in this instance. *See United States v. Posey*, 663 F.2d 37 (7th Cir.), *cert denied*, 455 U.S. 959 (1982); *State v. Warren*, 59 N.C. App. 264, 296 S.E.2d 671 (1982), *aff'd in perinent part*, 309 N.C. 224, 306 S.E.2d 446 (1983); *People v. Robinson*, 121 Misc.2d 267, 467 N.Y.S.2d 552 (Westchester County Ct. 1983); *People v. Zimmerman*, 117 Misc.2d 121, 458 N.Y.S.2d 468 (Sup. Ct. 1982).

kind of governmental intrusion without probable cause that occurred in this case. *See* Art. I, § 23, Fla. Const.

As to the marijuana cigarette butts found in the ashtray, we conclude that their seizure is not substantiable under a consent theory, since the trooper neither asked for nor received permission to search the passenger compartment.

The Inventory Search

We must also reject the state's contention that the seizure of the luggage was independently permissible under an inventory search theory. In *Colorado v. Bertine,* 107 S.Ct. 738 (1987), the United States Supreme Court delineated the requirements for opening sealed containers during a proper inventory search. *Bertine* stated:

> We emphasize that, in this case, the trial court found that the police department's procedures *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Id. at 741 n.6 (emphasis added; citation omitted). As Justice Blackmun noted in this special concurring opinion, joined by two other justices.[5]

> The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensured that inventory searches will not be used as a purposeful and general means of discovering evidence of

5 These three justices also concurred in the majority opinion, and specifically cited footnote 6 as a reason for so doing. 107 S.Ct. at 744. As a ground upon which a majority of the Court agreed, the "no discretion" requirement constitutes a clear holding of the *Bertine* court.

> crime. Thus, it is permissible for police officers to open closed containers in an inventory search *only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.*

Id. at 744 (Blackmun, Powell & O'Connor, JJ., concurring) (emphasis added; citation omitted).

The impermissible discretion to open or not to open containers is evident in this case. Contrary to *Bertine's* holding, the Florida Highway Patrol ("Patrol"), at least upon this record, operates under no mandatory standardized policy regarding closed containers. Unlike in *Bertine,* this record is devoid of any trial-court finding "that the police department's standard procedures did mandate the opening of closed containers and the listing of their consents." *Id.* Joining this action as *amicus curiae,* the Patrol itself has submitted copies of relevant portions of its Policy Manual, which fails to address the question. Chapter 16 of the Policy Manual, governing the receipt of property and vehicles, speaks in general terms and requires nothing more than an "[i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools." Policy Manual, at 16-4. There is no mention of opening closed containers.

In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance. The police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated *Bertine.*

The Impoundment Issue

Finally, we find that the impoundment in this instance, and hence the search of the interior of the car that followed was proper under *Bertine.* This conclusion is compelled by the fact that, to the extent of any inconsistency, *Bertine* has superseded *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981). Under the analysis in *Bertine,* we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in *Miller* and *Sanders.* Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousand dollars in cash rather than leave it unprotected at the roadside.

For this reason, we conclude that the seizure of the marijuana cigarette butts in this instance was permissible as an incident of a proper impoundment. *See* Art. I, § 12, Fla. Const. Since the cigarette butts were not inside any closed or locked container, the suppression of the butts was improper under *Bertine.*

We, thus, approve in part and quash in part the result reached by the district court below, and remand for proceedings consistent with this opinion. No renewed motion for rehearing will be entertained.

It is so ordered.

EHRLICH, C.J., and BARKETT, GRIMES and KOGAN, JJ., Concur

SHAW, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur

SHAW, J., dissenting.

Article I, section 12 of the Florida Constitution provides that rights granted therein involving searches and seizures

will be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court. Thus, the issue of impoundment and inventory search is controlled in *South Dakota v. Opperman*, 428 U.S. 364 (1976), and its progeny. I agree with the majority that *Colorado v. Bertine*, 479 U.S. 367 (1987), has overruled *Miller v. State*, 403 So.2d 1307 (Fla. 1981), and *Sanders v. State*, 403 So.2d 973 (Fla. 1981), that the police are not required to provide an alternative to impoundment, and that the marijuana cigarette butts found in the car's ashtray are admissible. For the reasons which follow, I do not agree that *Bertine* mandates exclusion of the eighteen pounds of marijuana found in the locked suitcase.

Wells was stopped for speeding on a rural road between Palatka and St. Augustine in the evening hours. He alighted from his car and produced an expired driver's license and a car title in another's name. After the officer detected alcohol on his breath, Wells failed a roadside sobriety test and was arrested for driving under the influence. Wells asked, however, to retrieve a coat from the car. While doing so, the officer saw a large sum of cash lying on the floorboard in front of the driver's seat. Wells gave conflicting explanations of this money and it was impounded and inventoried. The arresting officer asked Wells to open the car trunk and Wells agreed, saying he did not know what was inside, but neither the officer nor Wells could open the trunk. Wells agreed that the trunk could be forcibly opened, if necessary, after towing. The car was left with a backup officer and later towed. The arresting officer transported Wells to the local police station for a breathalyzer test and proceeded to the storage area to inventory the car. The arresting officer found two marijuana cigarette butts in the car's ashtray. The tow operator then opened the trunk where a locked suitcase was found. The suitcase was forced open and eighteen pounds of marijuana in a trash bag were seized.

The majority holds that the police acted properly in impounding the car. However, relying primarily on *Bertine*, the majority holds that the eighteen pounds of marijuana should be excluded because Florida Highway Patrol standardized procedures do not specifically mandate that locked containers found in impounded cars be opened and inventoried. Although the FHP can easily remedy this perceived deficiency in their operating instructions, I am persuaded that the current instructions effectively mandate the opening and inventorying of such closed containers when a vehicle is impounded and that these instructions are indistinguishable form those in *Bertine*.

The inventorying of the contents of impounded cars is based on three distinct needs: to protect the owner's property; to protect the police against claims over lost or stolen property; and to protect the police from potential dangers, such as explosives. *Opperman*, 428 U.S. at 369. The Florida Highway Patrol, Forms and Procedures Manual, section 16.000.00, provides:

> In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner *becomes the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents.* Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release,

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(Emphasis supplied). Chapter 16.01.00 of the manual provides that inventory forms will be used any time a vehicle is towed and/or stored. Chapter 16.02.00 instructs officers, inter alia: "Lost Property in Vehicle — Inventory of *all articles* in the vehicle should be shown such as articles of clothing, equipment and tools." (Emphasis supplied). The companion form contains columns labelled "Item," "Quantity," and "Description of Property Obtained."

In my view, these instructions make clear that an inventory is required for all impounded cars and that the inventory will be comprehensive and detailed, extending down to articles, not merely containers, closed or otherwise. This reading of the instructions is consistent with the testimony of the officer who conducted the arrest and inventory. According to this officer, he consulted with his backup officer and supervisor, and, as in the case of previous arrests, the inventory was performed according to procedures he was supposed to follow. This understanding of the standard instructions by the persons to whom they are addressed is also consistent with the three purposes of the inventory set forth in *Opperman* and reiterated in *Bertine*, none of which would be adequately served if closed containers were not opened and inventoried when vehicles are impounded.

The majority's conclusion that here, unlike *Bertine*, the police operating instructions do not mandate the opening of closed containers is contrary to the facts in *Bertine* as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." *Bertine,* 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory form listing all articles, such as articles of clothing, equipment, and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. *Bertine,* 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific than those which the *Bertine* concurring opinion found "mandate[d] the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view, *Bertine* stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

The majority also distinguishes *United States v. Ross,* 456 U.S. 798 (1982), holding that *Ross* addresses probable cause searches only and is not relevant to consent searches. However, in cases cited by petitioner and not distinguished by the majority, federal courts have found *Ross* relevant to the scope of a consent search. *United States v. Kapperman,* 764 F.2d 796, 794 (11th Cir. 1985); *United States v. White,* 706 F.2d 806, 808 (7th Cir. 1983). Moreover, on the authority of *Bertine*, *Ross* is relevant to inventory searches.

When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross, supra,* 456 U.S. at 821, 102 S.Ct. at 2170.

We reaffirm these principles here: "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.'" *See Lafayette, supra,* 462 U.S. at 648, 103 S.Ct. at 2610 (quoting *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981).

Bertine, 479 U.S. at 375. The broad application of these quoted words and the fact that the *Bertine* Court chose to affirm their application to a non-probable cause, inventory search strongly suggests that the Supreme Court does not take the narrow view of *Ross* which the majority adopts here. While *Ross* would not be authority to exceed the specific scope of a restricted consent, as the majority points out, it would appear to be applicable to an unrestricted consent search, or an inventory search, such as here.

In summary, the majority has misapplied *Bertine* which, in my view, is factually and legally indistinguishable from the case at hand. I would quash the decision below and reinstate the conviction.

OVERTON and McDONALD, JJ., CONCUR.

Application for Review of the Decision of the District Court of Appeal - District Conflict of Decisions

Fifth District - Case No. 85-1630

(Putnam County)

Robert A. Butterworth, Attorney General; Joseph N. D'Achille, Jr. and Fleming Lee, Assistant Attorneys General, Daytona Beach, Florida; and Elizabeth Masters and Walter M. Meginniss, Assistant Attorneys General, Tallahassee, Florida
for Petitioner

Sharon W. Ehrenreich of Moore & Ehrenreich, Gainesville, Florida,
for Respondent

Enoch J. Whitney, General Counsel and R. W. Evans, Assistant General Counsel, Tallahassee, Florida,
Amicus Curiae for Department of Highway Safety and Motor Vehicles

STATE OF FLORIDA,

Petitioner

v.

MARTIN LESLIE WELLS,

Respondent.

No. 69,363

Supreme Court of Florida

December 1, 1988

BARKETT, J.

We have for review *Wells v. State*, 492 So.2d 1375 (Fla. 5th DCA 1986), based on express and direct conflict with *State v. Wargin*, 418 So.2d 1261 (Fla. 4th DCA 1982). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in part the decision of the district court below.

While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this

1 A test later showed that respondent's blood alcohol content was below the legal limit. *Wells v. State*, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled *nolo contendere*, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review.

The facts of this case raise three distinct questions of search and seizure law: the scope of the consent search conducted in this instance, the propriety of opening the locked container found during the automobile inventory

search, and the propriety of the impoundment of respondent's vehicle.

The Consent Search

The state urges us to hold that respondent's general consent to open and look into the trunk of the automobile was sufficient to authorize the opening of any locked or closed containers found there. In support of this argument, the state contends that *Wargin* correctly extended the principles of *United States v. Ross,* 456 U.S. 798 (1982), to the consent-search context. We cannot agree.

Ross clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the *Ross* Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01. Based on these facts, *Ross* held: "If *probable cause* justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the *vehicle* and its contents that may conceal the object of the search." *Id.* at 825 (emphasis added).

There was no issue of a consent search in *Ross*. Indeed, the principles that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As *State v. Fuksman*, 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:

> The considerations upon which the holding in *Ross* is grounded do not exist in the consent search context where there is no probable cause. If a person consents to the search of a vehicle containing luggage and a search of the *vehicle alone* reveals nothing, the problem of the possible

> greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, they officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *Id.* On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but *not* in my trunk."

Thus, we decline to apply *Ross* to consent searches, and, to the extent it conflicts with our opinion today, we disapprove *Wargin*. We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

We also concur with the district court's conclusion that the consent given in this instance did not permit the police to pry open locked luggage with a knife. Respondent's permis-

sion merely indicated that the police could look into the automobile trunk. This was an insufficient basis for the police action that followed.

In so holding, we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.[2]

When the police are relying upon consent to conduct a warrantless search, they have no more authority than that

2 *Ross* itself reached this conclusion when it explicitly distinguished *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979). *See United States v. Ross*, 456 U.S. 798, 811-15 (1982). *Chadwick* had drawn a clear distinction between automobiles, which have a "diminished expectation of privacy," 433 U.S. at 12, and luggage which has "expectations of privacy ... substantially greater than in an automobile." *Id.* at 13. *Sanders* had suggested that a warrant was required to open a suitcase where "it ws the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U.S. at 767 (Burger, C.J., concurring in the judgment). *Ross* reaffirmed this holding, although it rejected some of *Sanders'* analysis. 456 U.S. at 824. If this conclusion applies when the police actually have probable cause to search luggage, it certainly applies when they do not.

As stated in *Chadwick*:

> Once the federal agents had seized it ... there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. ... With the footlocker safetlyimmobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

433 U.S. at 13. Moreover, *Chadwick* expressly noted that the search of the footlocker was a far greater intrusion into interests protected by the fourth amendment than was the mere seizure of the footlocker. *Id.* at 14 n.8.

reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis. Our own courts generally have agreed on this principle. *State v. Carney*, 423 So.2d 511 (Fla. 3d DCA 1982) (permission to go aboard boat did not give consent to open hidden compartments and containers therein); *Loftis v. State*, 391 So.2d 219 (Fla. 1st DCA 1980) (defendant's cooperation in opening truck did not give agricultural inspector consent to remove and open taped package), *review denied*, 399 So.2d 1146 (Fla. 1981); *Major v. State*, 389 So.2d 1203 (Fla. 3d DCA 1980) (no consent where defendant opened tote bag for airport officer to look in, but where officer spontaneously reached in and grabbed a nasal inhaler containing contraband), *review denied*, 408 So.2d 1095 (Fla. 1981); *Luxenburg v. State*, 384 So.2d 742 (Fla. 1st DCA 1980) (opening vehicle to agricultural inspector did not authorize him to slit open bag with knife); *Moorehead v. State*, 378 So.2d 123 (Fla. 2d DCA 1980) (consent for officer to look at pool cue did not authorize unscrewing of cue to see what was rattling inside); *Villari v. State*, 372 So.2d 522 (Fla. 1st DCA 1979) (no consent when defendant allowed access to vehicle but asked "Don't you need a warrant" when officers approached containers and luggage); *Ross v. State*, 369 So.2d 447 (Fla. 1st DCA 1979) (no consent when defendant allowed officers to look in camper but apparently denied acces[illegible] containers); *Raleigh v. State*, 365 So.2d 1048 (Fla. 4th DCA 1978) (no consent where occupants acquiesced to warrantless search of vehicle's trunk where officer opened trunk himself without asking permission).

In the present case, the arresting officer plainly stated that he had no actual consent to open the suitcase found in

the automobile trunk.[3] We thus must agree with the court below that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside.[4] *Wells,* 492 So.2d at 1378. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside that container, *Arkansas v. Sanders,* 442 U.S. 753, 765-66 (1979), that is protected under the United States Constitution and Florida's privacy amendment from the kind of governmental intrusion without probable cause that occurred in this case. *See* Art. I, § 23, Fla. Const.

3 The following colloquy with the arresting officer occurred:

> Q: Did [Wells] give you permission to go into the trunk of that car?
>
> A: Oh, yes, no problem, but he said — I said: "Do you mind if I look in your trunk," and he said, "Sure, go right ahead."
>
> . . . .
>
> Q: Now, since [Wells] had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?"
>
> A: No, I didn't.

4 We acknowledge that this case raises an issue as to whether respondent had standing to assert a privacy interest in the luggage itself, since he apparently contended the luggage was not his. *See United States v. Salvucci,* 448 U.S. 83 (1980). (Receding from the "automatic standing" doctrine). We find, however, that the state effectively waived this argument by failing to raise it below, or in this appeal. *See Steagald v. United States,* 451 U.S. 204, 209 (1981). Moreover, respondent unquestionably does have a protected privacy interest in the borrowed car he was driving, which confers standing to challenge both the impoundment and inventory search conducted in this instance. *See United States v. Posey,* 663 F.2d 37 (7th Cir.), *cert. denied,* 459 U.S. 959 (1982); *State v. Warren,* 59 N.C. App. 264, 296 S.E.2d 671 (1982), *aff'd in pertinent part,* 309 N.C. 224, 306 S.E.2d 446 (1983); *People v. Robinson,* 121 Misc.2d 267, 467 N.Y.S.2d 552 (Westchester County Ct. 1983); *People v. Zimmerman,* 117 Misc.2d 121, 458 N.W.S.2d 468 (Sup. Ct. 1982).

As to the marijuana cigarette butts found in the ashtray, we conclude that their seizure is not substainable under a consent theory, since the trooper neither asked for nor received permission to search the passenger compartment.

The Inventory Search

We must also reject the state's contention that the seizure of the luggage and marijuana cigarette butts was independently permissible under an inventory search theory. In *Colorado v. Bertine,* 107 S.Ct. 738 (1987), the United States Supreme Court delineated the requirements for opening sealed containers during a proper inventory search. *Bertine* stated:

> We emphasize that, in this case, the trial court found that the police department's procedures *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Id. at 741 n.6 (emphasis added; citation omitted). As Justice Blackmun noted in this special concurring opinion, joined by two other justices.[5]

> The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensured that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to

5 These three justices also concurred in the majority opinion, and specifically cited footnote 6 as a reason for so doing. 107 S.Ct. at 744. As a ground upon which a majority of the Court agreed, the "no discretion" requirement constitutes a clear holding of the *Bertine* court.

> open closed containers in an inventory search *only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.*

Id. at 744 (Blackmun, Powell & O'Connor, JJ., concurring) (emphasis added; citation omitted).

The impermissible discretion to open or not to open containers is evident in this case. Contrary to *Bertine's* holding, the Florida Highway Patrol ("Patrol"), at least upon this record, operates under no mandatory standardized policy regarding closed containers. Unlike in *Bertine,* this record is devoid of any trial-court finding "that the police department's standard procedures did mandate the opening of closed containers and the listing of their consents." *Id.* Joining this action as *amicus curiae*, the Patrol itself has submitted copies of relevant portions of its Policy Manual, which fails to address the question. Chapter 16 of the Policy Manual, governing the receipt of property and vehicles, speaks in general terms and requires nothing more than an "[i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools." Policy Manual, at 16-4. There is no mention of opening closed containers.

In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance. The police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated *Bertine.*

The Impoundment Issue

Finally, we find that the impoundment in this instance, and hence the search of the interior of the car that followed was proper under *Bertine.* This conclusion is compelled by the fact that, to the extent of any inconsistency, *Bertine* has superseded *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981). Under the analysis in *Bertine,* we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in *Miller* and *Sanders.* Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousand dollars in cash rather than leave it unprotected at the roadside.

For this reason, we conclude that the seizure of the marijuana cigarette butts in this instance was permissible as an incident of a proper impoundment. *See* Art. I, § 12, Fla. Const. Since the cigarette butts were not inside any closed or locked container, the suppression of the butts was improper under *Bertine.*

We, thus, approve in part and quash in part the result reached by the district court below, and remand for proceedings consistent with this opinion. No renewed motion for rehearing will be entertained.

It is so ordered.

EHRLICH, C.J., and BARKETT, GRIMES and KOGAN, JJ., Concur

SHAW, J., Dissents with an opinion, in which OVERTON and MCDONALD, JJ., Concur

SHAW, J., dissenting.

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will be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court. Thus, the issue of impoundment and inventory search is controlled in *South Dakota v. Opperman,* 428 U.S. 364 (1976), and its progeny. I agree with the majority that *Colorado v. Bertine,* 479 U.S. 367 (1987), has overruled *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981), that the police are not required to provide an alternative to impoundment, and that the marijuana cigarette butts found in the car's ashtray are admissible. For the reasons which follow, I do not agree that *Bertine* mandates exclusion of the eighteen pounds of marijuana found in the locked suitcase.

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The majority also distinguishes *United States v. Ross,* 456 U.S. 798 (1982), holding that *Ross* addresses probable cause searches only and is not relevant to consent searches. However, in cases cited by petitioner and not distinguished by the majority, federal courts have found *Ross* relevant to the scope of a consent search. *United States v. Kapperman*, 764 F.2d 796, 794 (11th Cir. 1985); *United States v. White,* 706 F.2d 806, 808 (7th Cir. 1983). Moreover, on the authority of *Bertine*, *Ross* is relevant to inventory searches.

When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand. *United States v. Ross, supra,* 456 U.S. at 821, 102 S.Ct. at 2170.

We reaffirm these principles here: " '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.' " *See Lafayette, supra,* 462 U.S. at 648, 103 S.Ct. at 2610 (quoting *New York v. Belton,* 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981).

Bertine, 479 U.S. at 375. The broad application of these quoted words and the fact that the *Bertine* Court chose to affirm their application to a non-probable cause, inventory search strongly suggests that the Supreme Court does not take the narrow view of *Ross* which the majority adopts here. While *Ross* would not be authority to exceed the specific scope of a restricted consent, as the majority point out, it would appear to be applicable to an unrestricted consent search, or an inventory search, such as here.

In summary, the majority has misapplied *Bertine* which, in my view, is factually and legally indistinguishable from the case at hand. I would quash the decision below and reinstate the conviction.

OVERTON and McDONALD, JJ., CONCUR.

Application for Review of the Decision of the District Court of Appeal - District Conflict of Decisions

Fifth District - Case No. 85-1630
(Putnam County)

Robert A. Butterworth, Attorney General; Joseph N. D'Achille, Jr., Daytona Beach, Florida and Elizabeth Masters, Tallahassee, Florida, Assistant Attorneys General, for Petitioner

Sharon W. Ehrenreich of the Law Firm of Huntley Johnson, Gainesville, Florida, for Respondent

Enoch J. Whitney, General Counsel and R. W. Evans, Assistant General Counsel, Tallahassee, Florida, Amicus Curiae for Department of Highway Safety and Motor Vehicles

MARTIN LESLIE WELLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NO. 85-1630

In the District Court of Appeal
of the State of Florida Fifth District

August 21, 1986

Appeal from the Circuit Court for Putnam County;

E. L. Eastmoore and Robert R. Perry, Judges

Sharon W. Ehrenreich of Law Firm of Huntley Johnson, Gainesville, for Appellant.

Jim Smith, Attorney General Tallahassee, Florida, and Joseph N. D'Achille, Jr., Assistant Attorney General, Daytona Beach, Florida, for Appellee.

Orfinger, J.

The defendant appeals from a conviction for possession of a controlled substance and the term of probation imposed, having entered a plea of nolo contendere, specifically preserving his right to appeal the denial of his motion to suppress evidence. Because we conclude that the warrantless search was unreasonable and unlawful, we reserve.

The facts are not in dispute. On the evening of Monday, February 11, 1985, Trooper Rodney Adams of the Florida Highway patrol stopped the appellant for speeding. The appellant exited his vehicle and produced his driver's license and explained to the officer that the car belonged to a friend. The officer ran a license and tag check and verified the accuracy of the statement concerning the ownership of the car, and also determined that the appellant's driver's license had expired. During the course of conversation, Trooper Adams noticed the smell of alcohol upon the appellant's person. After appellant acknowledged that he had been drinking, field sobriety tests were administered to him and the appellant was then arrested for driving under the influence of alcohol. Appellant agreed to take a breathalyzer test and Trooper Adams informed him that he would be transported to the machine located at the Florida Highway Patrol Station. The officer testified that the car was parked off the highway, and was not a hazard to traffic.

Before departing to the station, appellant asked Adams if he could retrieve his jacket, which was in the automobile. Adams returned to the car with appellant to be certain that appellant was not going after a weapon. When appellant opened the car door Trooper Adams, using his flashlight, saw what appeared to be a large sum of money lying on the floorboard on the driver's side.

The officer testified that while he wondered about the money, he had no reason to believe that there was any contraband in the car, but because he believed that he had to impound the car he asked for permission to look in its trunk. Appellant first attempted to open the trunk and when unable to do so, gave the key to Trooper Adams who also unsuccessful. Appellant was told that if the trunk could not be opened with the key, that it may have to be "popped" open. The appellant agreed to this and indicated that he did not know what was in the trunk. Appellant was taken to the

Florida Highway Patrol station to take the breathalyzer test and the vehicle was towed to K & S Automotive at approximately 12:30 or 1:00 A.M. The officer never asked for and was never given permission to search the passenger compartment of the car.

Trooper Adams arrived at K & S Automotive at approximately 1:30 A.M. and proceeded to search the car with the assistance of Grover Bryon, an employee of K & S. A search of the interior of the car resulted in the discovery of two marijuana "roaches" in the ashtray. Bryon opened the locked trunk with the key, explaining to the officer that the button had to be depressed as the key was turned. There was only a locked blue suitcase in the trunk. Adams instructed Bryon and another employee of K & S to pry open the locked suitcase. After about 10 minutes, the suitcase was pryed open and a dark colored plastic garbage bag was found inside the suitcase. Adams opened the garbage bag and found inside a quantity of marijuana.

Although the officer throughout his testimony characterized the search as an "inventory search," it is clear that the warrantless search cannot be sustained on that basis. The parked automobile was not a traffic hazard, there was no cause to believe that it contained contraband, and the officer concededly did not advise the defendant of alternatives to impoundment which were available to him.[1] *Miller v. State,*

1 The officer testified that the defendant was alert and cooperative. The defendant tested .08 percent on the breathalyzer, less than the .1 percent required by law for a legal presumption that the person is under the influence of alcoholic beverages to the extent that his normal faculties are impaired. § 316.1934, Fla. Stat. (1985). Thus it is clear that there was no impediment to a dialogue between the officer and the defendant about possible alternatives to impoundment of the vehicle. Nor do these facts suggest that the defendant lacked the capacity to understand those alternatives. *See Sanders v. State,* 403 So.2d 973 (Fla. 1981).

403 So.2d 1307 (Fla. 1981); *State v. Marini,* 488 So.2d 551 (Fla. 5th DCA 1986); *Moore v. State,* 417 So.2d 1131 (Fla. 5th DCA 1982). The evidence would not support the search on the basis of probable cause because on this point too, the officer conceded that he had none. Nor can the search be supported as one incident to the defendant's arrest, because it was not contemporaneous to the arrest. *Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); *State v. Marini, supra.*

The State does not dispute these principles, but does contend, however, that the search was based on consent, a recognized exception to the warrant requirement. The real question thus presented is whether the appellant's consent to look in the trunk of the car included consent to open and search the locked suitcase found in the trunk. If the search of the suitcase (and the passenger compartment) was validly based on consent, the search is not invalidated by the fact that the officer mistakenly characterized it as an inventory search. *Padron v. State,* 449 So.2d 811 (Fla. 1984).

The State relies strongly on *State v. Wargin,* 418 So.2d 1261 (Fla. 4th DCA 1982) wherein the court extended the rule announced in *Ross v. United States,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) to consent searches. In *Ross,* the Supreme Court held that if a police officer has probable cause to search an automobile, then he is justified in searching every part of the vehicle and all containers found therein that may conceal the object of the search. *Id.* In *Wargin*, the Fourth DCA applied this rule to a consensual search and held that consent to search a suitcase automatically extended to a search of all containers therein.

The defendant in *Wargin* was stopped in an airport by narcotics agents. The defendant gave his consent to a search of his suitcase. In the presence of the defendant, the police searched his suitcase and found a "strangely heavy" Kleenex

box. The box was opened and a plastic bag containing cocaine was found therein. The court held that an additional request for consent to search the Kleenex box was unnecessary for once the defendant gave his consent to a search of the suitcase, he consented to the search of all containers therein. The court, without extensive analysis, explained its holding as an extension of the *Ross* rule to consensual searches.

The Third DCA has considered the same question and has held contrary to the *Wargin* decision. In *State v. Fuksman,* 468 So.2d 1067 (Fla. 3d DCA 1985), the defendant, a suspect in the theft of airline tickets, was stopped in his automobile for committing a traffic violation. The law enforcement officer asked the defendant if he could search his car, but did not inform the defendant of the nature of the investigation or the object of the search. The defendant agreed and unlocked the doors. The officer opened the door and picked up the defendant's locked briefcase and opened it, finding the airline tickets.

In appealing the trial court's suppression of the evidence, the State argued that *Wargin* compelled reversal in that the defendant's consent to a search of his automobile extended to a search of his briefcase. In a well-reasoned opinion, the court re-examined the decision in *Ross* and held that it did not apply to consensual searches. The court recognized that the considerations upon which the holding in *Ross* was grounded to do exist in a consensual search:

> The foundation of the automobile exception is the existence of probable cause. *Ross*, 456 U.S. at 807-09, 102 S.Ct. at 2163-64; *Caroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924). It is the presence of probable cause and the practical considerations which emanate from its presence in the automobile search context which

form the basis of the decision in *Ross.* The court emphasized, first, the necessity of the existence of probable cause and, second, the consequences of not allowing a search of containers. Those consequences include the greater intrusion of seizure or detention of the vehicle, containers and/or persons involved until a probable cause determination can be made by a magistrate. *Ross*, 456 U.S. at 806-08, 102 S.Ct. at 2163-64. The court specifically indicated that it was not deciding the scope of warrantless searches of automobiles done without probable cause. *Id.* at 809, n.11, 102 S.Ct. at 2164 n.11.

> The considerations upon which the holding in *Ross* is grounded do not exist in the consent search context where there is no probable cause. If a person consents to a search of a vehicle containing luggage and a search of the *vehicle alone* reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage. [Emphasis in original].

Fuksman, 463 So.2d at 1069-1070.

We agree with the analysis of *Fuksman*.[2] *Ross* clearly was bottomed in the existence of probable cause, as indicated by the concluding paragraph of that opinion:

> We hold that the scope of the warrantless search authorized by [the automobile] exception is no broader and no narrow than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

102 S.Ct. at 2173.

State v. Cargal, 417 So.2d 811 (Fla. 5th DCA 1982), also relied on by the State, can be distinguished. In *Cargal*, the defendant gave the police permission to search his van. Upon entering the van, the officers detected a strong odor of marijuana emanating from a duffel bag in the van. The texture of the bag was also grassy in nature. The court reversed the order suppressing the marijuana and an automatic weapon found in the bag, citing *Ross* as all as other cases. It is obvious that once the officers were lawfully inside the van based on consent to enter, the odor of marijuana coupled with the grassy texture of the contents gave the officers probable cause to believe that the bag contained

2 Were it not for the broad holding in *Wargin* that a general consent to search includes consent to search closed containers found within the search area, we could agree with its result on the facts of that case. Because the defendant fit a drug courier profile, the officers approached him, *identified themselves as narcotics agents* and asked for permission to search the suitcase. Clearly they were searching for narcotics. Thus, from those facts the court could conclude that the consent to search the suitcase included consent to search any container within the suitcase which might contain the announced object of the search. In the case *sub judice* nothing even resembling these facts is present. This case more closely resembles *State v. Carney*, 423 So.2d 511 (Fla. 3d DCA 1982), where the court held that permission to go abroad defendant's boat was not equivalent to consent to search hidden compartments and containers.

contraband, and because it was contained within a motor vehicle, a warrantless search of the bag was authorized. The essential difference between *Cargal* and this case is that at no time prior to prying open the suitcase did the officer ever have probable cause to believe that the automobile or any container therein held any contraband.

Consent searches operate on different rules than probable cause searches. The State agrees that a consensual search may be restricted in terms of time or area, *Leonard v. State,* 431 So.2d 614 (Fla. 4th DCA 1982), and must be terminated upon withdrawal of consent. *Goldberg v. State,* 407 So.2d 352 (Fla. 4th DCA 1981). No such rules apply in probable cause searches. What is included within the scope of a consent to search is ordinarily to be determined by the totality of the circumstances. *Martin v. State,* 411 So.2d 169 (Fla. 1982); *Fuksman, supra.* We hold here that the totality of the circumstances demonstrate that appellant's permission "to look in the trunk" was that and nothing more, and did not extend to the locked luggage within the trunk, nor to the passenger compartment of the car. Without such consent, the search was unlawful. *See Horvitz v. State,* 433 So.2d 545 (Fla. 4th DCA 1983).

REVERSED.

UPCHURCH, C.J., and COBB, J., concur.

FLORIDA HIGHWAY PATROL FORMS AND PROCEDURAL MANUAL Chapter 16

RECEIPTS, PROPERTY AND VEHICLE

16.00.00 Purpose of Vehicle and Property Receipts

In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner become the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents. Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

16.01.00 Application

These forms will be used anytime a vehicle is towed and/or stored. It is to be used when property is impounded or stored for any reason. If the owner or possessor is not present, arrangements should be made to leave the receipt in a conspicuous place on the vehicle. In most incidents Property Receipts should be given to the owner or in his/her absence, it should be given to the driver.

16.02.00 Instructions for Completing the Inventory and Vehicle Storage Receipt (HSMV 61801):

1. Date of Storage/Towing - Enter date vehicle is being towed or stored. Example: 08-30-84.

2. Time - Enter time. Strike through non-applicable A.M. or P.M.

3. FHP Case Number - Enter assigned number.

4. Name/Address of Owner - Show home address of owner, (avoid P. O. Box numbers), city, state, zip code.

5. Year Vehicle - Enter year vehicle was manufactured.

6. Make of Vehicle - Example: Ford, Chevrolet. Avoid types such as Mustang, Impala.

7. Body Style - Two (2) door, Four (4) door.

8. V.I.N. - Enter Vehicle Identification number.

9. Color - Enter color, designations rather than manufacture's color classification. Use basic colors - black, blue. If the vehicle is two tone use a slash to indicate such. Example: white/blue.

10. Tag Number - Enter complete license number on vehicle.

11. State - Enter the state the tag is assigned to. Proper abbreviation of state permissible. Example: Florida (FL), Georgia (GA).

12. Location Vehicle Towed From - Enter location of where vehicle is being released to wrecker driver. Show state road, county road or street address if applicable. In rural areas give approximate distance from nearest town or community.

13. Name of Towing Service - Enter name of wrecker service. If not a rotation call, list address and city of towing service.

14. Address of Where Vehicle is Stored - Show street address of location where vehicle is to be stored.

15. Hold on Vehicle - Check appropriate block to indicate whether there is a hold on vehicle.

16. Reason for Hold - Indicate the reason vehicle is being held. Example: Pending Homicide Investigation, Hit and Run Investigation, etc. If there is not a hold on vehicle this area must be left blank.

17. Equipment on Vehicle - Check appropriate box indicating equipment affixed to vehicle. Under **Other Equipment** list any equipment in the vehicle that has not been listed above.

18. List Property in Vehicle - Inventory of all articles in the vehicle should be shown such as articles of clothing, equipment and tools.

19. Identify Marks or Damage - Indicate any identifying marks or damage to vehicle that occurred prior to vehicle being released to the wrecker driver.

20. Signature - Of Trooper indicating hold on vehicle. Vehicles with hold, orders are the responsibility of the Trooper. Keep in mind, vehicles in most cases cannot be held more than (72) hours without approval of State Attorney's Office.

21. Signature - Tow Truck Driver - Have the person taking possession of vehicle sign. At this time the vehicle becomes the responsibility of the tow truck driver.

22. Signature - Impounding Officer(s) - This is to be signed by the Impounding Officer and if possible, another

Trooper's signature certifying that the inventory is correct to the best of their knowledge.

23. Badge Number - Current badge number of impounding Trooper.

24. Badge Number - Current badger number of witness.

25. Troop - Impounding officer's assigned Troop.

26. District - Enter District within the assigned Troop.

27. Copies: White - Original copy to be filed at District Headquarters. Yellow - To be given to the owner and/or driver. Pink Copy to go to the wrecker driver taking possession of vehicle.

16.03.00 Instructions for Completing the Evidence and/or Property Receipt HSMV 61802

1. Other Department Case No: Other case number not assigned by the Department: Example: Warrant from another Department.

2. Date - Date property received.

3. FHP Case No. - Case number assigned by the Florida Highway Patrol.

4. The nature of the property recorded and/or reason it was stored - Place a check mark by the appropriate information. Property of deceased; stolen property; bulk; physical evidence; trial; found; laboratory evidence; Destroy (to be destroyed); safe keeping.

5. Address where property impounded.

6. Type case - (accident, stolen, etc.)

7. Discovered by - (Enter full name, address, phone).

8. Owner/Victim - (Enter full name, address, phone). Cross out which ever does not apply.

9. Subject/Suspect Name - Incarcerated - (Yes or No). Warrant - (Yes or No). (Warrant number should be other Department Case Number).

10. Item, Quantity and Description of Property Obtained (This section itemized list of property).

11. This section is to verify the property taken is a complete list of property taken from the person.

12. Signature of officer receiving evidence/property - Enter appropriate Troop letter, District, I.D. number and badge number.

13. If necessary for proper handling, contact the State Attorney's Office and record the State Attorney, Assistant or otherwise name, address and phone for further referral.

14. When evidence is placed in the evidence locker, the officer in charge will sign the receipt and enter the reason stored, date and time. The Trooper should keep a copy of the receipt of the property. When it is necessary to take property out, the receipt will be returned and an entry made in this section as to who, why and when the property is being removed. In cases for court, keeping record of the chain of custody as well as record on removal and return must be maintained at all times. The final disposition may be a court order to destroy the property or to return the property to the original possessor.

FLORIDA HIGHWAY PATROL INVENTORY AND VEHICLE STORAGE RECEIPT

1. Date of Storage/Towing

2. Time (A.M. or P.M.).

3. FHP Case No.

4. Name/Owner Address/Owner

5. Year Vehicle

6. Make of Vehicle

7. Body Style Miles

8. VIN#

9. COLOR

10. Tag #

11. State

12. Location Vehicle Invent. & Towed From

13. Name of Towing Service

14. Address where Vehicle is Stored

15. Hold on Vehicle (Yes or No)

16. Reason for Hold

17. Equipment of Vehicle: AM Radio, AM-FM Radio, AM-FM Radio/Tape Deck, CB Radio/2 Way Radio, Outside Rearview Mirrors, Well Covers/No of ____ Jack, ____ No. of Tires (including spare), Other Equipment

18. List Property in Vehicle

19. Identifying Marks or Damage

20. Signature (officer)

21. Signature (tow truck driver)

22. Signature (impounding officer

23. Badge Number

24. Officers Name

25. Troop

26. District

Supreme Court, U.S.
FILED
AUG 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1835

In The

Supreme Court Of The United States

October Term, 1988

STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF OF THE MERITS

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August 12, 1989

QUESTION PRESENTED

Where a law enforcement agency maintains instructions requiring a comprehensive and detailed inventory for all impounded cars, but closed containers are not specifically dealt with, do these types of instructions permit an impounding officer to search and inventory closed containers?

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A. A policy which requires that all impounded cars be inventoried satisfies the standard criteria required by *Bertine* to insure that the inventory search is not conducted solely to uncover evidence of criminal activity. 10

B. A procedure which permits the scope of the inventory search to be determined by the objective facts is in accordance with the administrative and safety interests of inventory searches 13

C. By requiring that the Florida Highway Patrol inventory procedures specifically address closed containers, the Florida Supreme Court has devised rules requiring a different procedure, in contravention of this Court's holding in *Bertine*. 17

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NO. 88-1835

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STATE OF FLORIDA,

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MARTIN LESLIE WELLS,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 539 So.2d 464 (Fla. 1989) (JA. 248-263). This opinion was entered on rehearing and the original opinion was withdrawn and is not reported, except at 13 F.L.W. 686 (Fla. Dec. 1, 1988). (JA. 264-279).

The opinion of the District Court of Appeal of Florida, Fifth District is reported at 492 So.2d 1375 (5th DCA, 1986). (JA. 280-287).

The trial court's order denying the motion of Respondent, MARTIN LESLIE WELLS to suppress evidence is not reported. (JA. 22).

JURISDICTION

The Supreme Court of Florida's opinion on rehearing was filed on March 2, 1989. This Court has jurisdiction. 28 U.S.C. 1257(3). On April 27, 1989, Florida filed a petition for writ of certiorari, which this Court granted on June 19, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...

Amendment XIV, Section 1, United States Constitution provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent, MARTIN LESLIE WELLS ("Wells"), was the respondent in the Supreme Court of Florida. The facts of this case, as set forth in the decision below, are as follows:

> While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.* When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.
>
> Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special

locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During the search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review. (JA. 248-249).

* A test later showed that respondent's blood alcohol content was below the legal limit. *Wells v. State*, 492 So.2d 1975, 1876 n.1, (Fla. 5th DCA 1966)

The Supreme Court of Florida accepted the State's petition for discretionary review. That court approved in part

and quashed in part the decision of the district court.[1] The Supreme Court concluded that Well's consent to search was strictly limited to the trunk and the seizure of the marijuana cigarette butts from the passenger compartment, and the marijuana from the suitcase was, on this ground, properly suppressed. The court also concluded that even though the vehicle was legally impounded, the permissible scope of the inventory search only extended to the interior of the car and not to the opening of the suitcase found in the trunk.[2] Therefore, on this ground, the court quashed that part of the district court's decision that suppressed the marijuana cigarette butts and approved the part which suppressed the marijuana found in the suitcase. (JA. 250-257).

With respect to the scope of the inventory search, the court found that *Colorado v. Bertine,* 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), required the suppression of the marijuana found in the closed suitcase. According to the court, *Bertine* requires that there be specific policies regarding the scope of an inventory search. Such policies are required to limit the impermissible discretion a police officer has when it is his decision whether or not to open a closed container. The court, relying on part of Footnote 6 of *Bertine,* found the foregoing to be a clear holding of the *Bertine* Court. Footnote 6 states:

> We emphasize that, in this case, the trial court found that the police department's procedures

1 The Supreme Court of Florida's opinion on rehearing modified its original opinion only by finding that the seizure of the marijuana cigarette butts discovered during the inventory search of the passenger compartment was constitutional. The Court did not modify its holding that the scope of the inventory search did not extend to closed containers without a standardized policy on the subject.

2 The court's opinion validated an inventory search of the interior of the vehicle, without differentiating between the passenger compartment and the trunk. The court's rationale, however, accepts the validity of the inventory search of the trunk, but not of the closed containers found within the trunk.

> *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

(Quoted in JA. 255). (Florida Supreme Court emphasis).

In applying this interpretation, the court found that the Florida Highway Patrol did not have a standard procedure that mandated the opening of all containers found during an inventory search. The failure to have such a policy placed impermissible discretion with the police, and therefore the opening of the suitcase violated *Bertine*. (JA. 255-256).

The dissent found that the majority's interpretation of *Bertine* was overly restrictive and erroneous. (JA. 259). The purpose of an inventory search is: to protect the owner's property; to protect the police against claims over lost and stolen property; and to protect the police from potential dangers. *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). (JA. 259). The Florida Highway Patrol's manual was designed to meet these purposes when it made the impounding officer liable for the vehicle, its parts and contents; and instructed the impounding officer to inventory all articles in the vehicle. (JA. 260). The dissent also concluded that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, the scope of the inventory encompasses the entire vehicle and its contents. (JA. 260). Specific guidelines delineating the scope of the search are not required under *Bertine,* as long as there is a standard policy that all impounded vehicles be inventoried, and the reasons for the policy are consistent with the three purposes of the inventory search set forth in *Opperman* and reiterated in *Bertine*. (JA. 260-261). Therefore, the dissent would have entirely quashed the district court's decision and would have reinstated the conviction. (JA. 262).

SUMMARY OF ARGUMENT

It is well settled that inventories of impounded vehicles are reasonable where the process is aimed at securing or protecting the car, its contents or the police. *South Dakota v. Opperman,* 428 U.S. 364, 373, 99 S.Ct. 3092, 3099, 49 L.Ed.2d 1000, 1007 (1976). Such searches are unreasonable and therefore violative of the Fourth Amendment when used as a ruse to conduct an investigatory search. *Colorado v. Bertine,* 479 U.S. 367, 371-372, 107 S.Ct. 739, 741, 93 L.Ed.2d 739, 745 (1987).

To insure that the decision whether or not to conduct an inventory search is not left to the unfettered discretion of the police, and thereby violative of the Fourth Amendment, there must be a policy which requires that all impounded vehicles be subject to an inventory search. This procedure will prohibit police from simply searching those vehicles which they believe might contain evidence of criminal activity. Further, such a requirement would foster the administrative and safety needs which encompass inventory searches.

When police are constitutionally required to inventory every impounded vehicle, they should be given the discretion to determine the scope of the search. This discretion, in order to be constitutionally sanctioned, must be reviewed by an objective standard. This objective standard, similar to that implemented by this Court in *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660, 667-668 (1979), would permit review of police conduct without taking the subjective considerations of the police into account. This would permit the police flexibility in achieving the administrative and safety concerns of an inventory search since it would allow the police to open closed containers whenever there are sufficient objective facts to support the conclusion that the search was for a legitimate purpose. To hold other-

wise, would bind the police to search either all or none. This lack of permissible discretion would negate the police's ability to determine the proper action under the particular circumstance.

An application of the foregoing standards to the instant case would establish that the Florida Supreme Court erred when it determined that the scope of the inventory search did not extend to the locked suitcase. The objective factors present, the cash on the floor of the car and the marijuana cigarette butts in the ashtray, definitely lead to the reasonable conclusion that, as a result of a drug deal, either money or weapons were located in the suitcase.

ARGUMENT

Introduction

This Court first recognized the inventory search exception to the warrant requirement in *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), holding that the contents of vehicles taken into police custody may be inventoried without a warrant, probable cause or reasonable suspicion. *Opperman* identified three justifications for the inventory exception: protection of the owner's property while it is in police custody; protection of the police against claims of lost or stolen property; and protection of the police from danger. *Id.,* 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005. These justifications were reiterated in *Bertine,* 479 U.S. 367, 372, 107 S.Ct. 738, 741, 93 L.Ed.2d 739, 745-746. These strong governmental interests are sufficient to justify a routine inventory of the contents of impounded vehicles.

The Supreme Court of Florida, relying on *Bertine,* upheld the inventory search of the interior of the car, but invalidated the inventory search of the closed suitcase. The court

reasoned that since the Florida Highway Patrol did not maintain a specific standardized policy regarding the opening of closed containers discovered in the car during lawful inventory searches, the scope of the search could not extend to closed containers. The court concluded that without a specific policy covering the subject, impermissible discretion was given to the searching officer to determine in all situations, whether or not to open a closed container. The court specifically relied on Footnote 6 of *Bertine*:

> We emphasize that, in this case, the trial court found that the police department's procedures *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

(Quoted in JA. 255). (Florida Supreme Court emphasis).

The issue before the Court is whether *Bertine's* requirement that inventories be conducted according to standardized criteria is satisfied by a policy requiring all impounded cars be inventoried and a procedure which permits discretion, based on objective facts, in determining the scope of the inventory search. This brief will show that *Bertine's* standardized criteria were designed to restrict inventory searches solely to look for evidence of criminal activity and, therefore, a requirement that all impounded vehicles be inventoried satisfies that criteria. This brief will then show that once a valid inventory search is undertaken, the scope of the search, based on objective facts, is within the exercise of police discretion. The search is constitutional when the objective facts show that it was reasonable to search the item for administrative or safety concerns.

I. WHEN A LAW ENFORCEMENT AGENCY MAINTAINS INSTRUCTIONS REQUIRING A COMPREHENSIVE AND DETAILED INVENTORY FOR ALL IMPOUNDED CARS, BUT CLOSED CONTAINERS ARE NOT SPECIFICALLY DEALT WITH, THESE TYPES OF INSTRUCTIONS PERMIT IMPOUNDING OFFICERS TO SEARCH AND INVENTORY CLOSED CONTAINERS.

A. A policy which requires that all impounded cars be inventoried satisfies the standard criteria required by *Bertine* to insure that the inventory search is not conducted solely to uncover evidence of criminal activity.

After Wells' vehicle was lawfully impounded, (JA. 257), an inventory search was conducted in the passenger compartment and the trunk. (JA. 255-256). The car was inventoried in accordance with the Florida Highway Patrol's written rules which require that the vehicle, its parts and contents are to be searched and inventoried. (JA. 288,290). During the search of the trunk, the suitcase was located and was pried open for inventory purposes. (JA. 249).

The Florida Supreme Court suppressed the marijuana, finding that the scope of the inventory search did not extend to the opening of closed containers. (JA. 256). The Court held:

> In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance. The police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated *Bertine*.

(JA. 256).

The Florida Supreme Court's holding is based on Footnote 6 of *Bertine,* and is erroneous since its interpretation resulted in an overly restrictive misapplication of the law to the facts. *Bertine* does not condemn all forms of police discretion, but only that discretion which is exercised on the basis of suspicion of criminal activity and is utilized to search for evidence of criminal activity.

> ...Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

Bertine, 479 U.S. at 375, 107 S.Ct. at 743, 93 L.Ed.2d at 748 (Footnote omitted).

The Florida Highway Patrol's Forms and Procedures Manual, is designed to eliminate the "evidentiary" discretion prohibited by *Bertine.* Chapter 16, Section 16.00.00 provides:

Purpose of Vehicle and Property Receipts

In the course of duty on a day to day basis, *it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored.* Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and *not in the possession of the owner becomes the responsibility of the impounding officer. The officer is liable for the vehicle, its parts and contents.* Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(JA. 288). (Emphasis supplied). Section 16.01.00 provides that inventory forms are to be used *any* time a vehicle is impounded. (JA. 288). Section 16.02.00 requires that an officer, when completing the inventory and vehicle storage receipt, list an inventory of *all articles* in the vehicle and gives examples thereof. (Emphasis supplied). (JA. 290). The inventory form requires that the officer list enumerated and unenumerated equipment as well as property found in the vehicle. (JA. 293).

Florida submits that the foregoing regulations requiring all impounded vehicles to be inventoried satisfy the standard criteria necessary to prohibit the "evidentiary" discretion denounced in *Bertine*. By requiring an inventory search

of all impounded vehicles and extending the scope to all articles anywhere in the vehicle, the Florida Highway Patrol's policy prohibits its officers from exercising the unfettered discretion to conduct detailed searches on only those vehicles which they have a suspicion that evidence of criminal activity will be found. It is this discretion, Florida submits, that is the focus of Footnote 6 of *Bertine* and not the discretion to open closed containers found during lawful inventory searches.

B. A procedure which permits the scope of the inventory search to be determined by the objective facts is in accordance with the administrative and safety interests of inventory searches.

When a police agency's policy requires that all impounded vehicles be inventoried, the police officer conducting the inventory must have the discretion to determine the exact scope of the search. This rule would implement the well settled principle that inventory searches are reasonable where the process is aimed at securing or protecting the car, its contents, and the police, from both theft and dangerous instrumentalities. *South Dakota v. Opperman,* 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005. Such searches are unreasonable only when used as a ruse to conduct an investigatory search. *Colorado v. Bertine,* 470 U.S. at 371-372, 107 S.Ct. at 741, 93 L.Ed.2d at 745. Florida submits that the scope of an inventory search's lawfulness under the Fourth Amendment must be determined by the facts as applied to an objective standard.

The objective standard of reviewing the reasonableness of police conduct under the Fourth Amendment is well known to this Court. In *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660, 667-668 (1979), this Court

noted that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard'...." *See also, Terry v. Ohio,* 392 U.S. 1, 16, 80 S.Ct. 1860, 1877, 20 L.Ed.2d 889, 903 (1968).

The objective standard provides a starting point from which to determine if the exercise of police discretion, in a given situation, exceeds constitutional bounds. The action would be reasonable if found to have an administrative or safety motivation, as opposed to evidentiary one. If the object searched is customarily used by most people to carry valuable items, or might reasonably contain a dangerous device which threatens the personal safety of the officer, then it is more probable that the officer has stayed within the bounds of constitutional discretion. However, if an objective observer would conclude that the only legitimate purpose for opening a container found in a vehicle could have been to find evidence of criminal activity, the opening of the container would be an illegal search. As this Court noted in *Illinois v. Lafayette,* 462 U.S. 640, 647, 105 S.Ct. 2605, 2610, 77 L.Ed.2d 65, 71 (1983) "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns."

In view of the multitude of vehicles and property which come into the custody of law enforcement agencies, some discretion to determine the scope of the search is essential. On any given day, law enforcement officers impound vehicles as a result of abandonment, recovery from theft, traffic accidents, discovery of contraband, or a custodial arrest. These vehicles include automobiles, trucks, tractor-trailers,

passenger vehicles with a trailer in tow, and commercial vehicles.

The property located within such vehicles obviously runs the gamut from personal items to inventory. An agency cannot possibly draft a policy which takes into consideration every circumstance that may be encountered by an officer. Policies may be drafted, such as section 16.00.00 of the Florida Highway Patrol Forms and Procedures Manual which generally address the procedures that a trooper should follow after a vehicle is impounded. As in the present case, these procedures are fleshed out "in the field" by officers under the guidance of their supervisors. (JA. 260).

Taken to its logical extreme, the blind application of a policy by officers without any consideration of the circumstances defeats the purpose of the inventory search. If an officer must open and inventory every closed container, such as a U-Haul trailer containing a family's belongings, a commercial trailer transporting perishable inventory, or Christmas packages that have been taped and wrapped, the agency is not able to balance the intrusion to the motorist against the agency's needs to protect the property and the police and to deter false claims. Opening containers in these circumstances will not necessarily protect the property and the police and will certainly encourage claims against the agency.

The objective facts, as seen by the officer, must determine to a degree the scope of the search regardless of the specificity of the policy. If the search is merely a pretext for an investigation, it should be considered unreasonable. However, if in light of the facts, a caretaking function has been performed, such as protecting the property, protecting the safety of the police or the public, or preventing claims, an inventory search should be upheld.

This point was implicitly recognized by the Florida Supreme Court with regard to the impoundment of the vehicle. The court held that it was reasonable to impound the vehicle because of the large amount of currency that was discovered by the trooper. (JA. 257).

For the same reason, it logically follows that the officer should have inventoried the suitcase to determine if other currency or valuables were present. Upon discovering the currency, the trooper acted reasonably by opening the suitcase rather than leaving it unprotected with the vehicle at the storage yard, contents unknown. The same facts which justified the impoundment in this case, should also justify the inventory search.

The implication of the ruling by the Florida Supreme Court is that an officer's discretion is permissible in an impoundment if the impoundment is reasonable, but that any discretion in conducting an inventory renders the inventory search unreasonable. The courts, consequently, will be placed in the role of drafting law enforcement policies rather than determining the reasonableness of police conduct.

Accepting the Florida Supreme Court's interpretation of *Bertine* would, in effect, establish a bright line test for constitutionally sanctioned conduct under the Fourth Amendment. This would directly contravene this Court's rule that "[t]he test of the reasonableness of conduct under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for investigating it and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481

(1979). Therefore, only a case by case determination, based on the objective facts, can establish whether the discretion used in delineating the scope of the search was within constitutional bounds.

C. By requiring that the Florida Highway Patrol inventory procedures specifically address closed containers, the Florida Supreme Court has devised rules requiring a different procedure, in contravention of this Court's holding in *Bertine*.

By focusing exclusively on the wording of Chapter 16 of the Florida Highway Patrol Policy Manual and Chapter 16 of the Florida Highway Patrol Forms and Procedures Manual, the Florida Supreme Court has ignored the central issue of whether the inventory procedures followed by the trooper in this case were reasonable. If the decision of the Florida Supreme Court is allowed to stand, inventory policies and procedures may be freely second-guessed by the courts. Any court reviewing an inventory search could substitute its penmanship for that of the law enforcement agency. Policies and procedures are written by agencies to guide law enforcement officers in the performance of their duties. As a result of the decision by the Florida Supreme Court, a law enforcement agency, such as the Florida Highway Patrol, will be required to tailor its inventory policies to the whims of the courts.

Such a result runs afoul of *Bertine*. This Court reiterated in *Bertine* the well-settled principle that "a single familiar standard is essential to guide police officers ...", 475 U.S. at 375, 107 S.Ct. at 743, 83 L.Ed.2d at 748. If the opinion of the Florida Supreme Court stands, officers will not benefit from such a standard. Instead, they can expect repeated challenges to the wording of inventory policies as the measure

of their conduct. The role of courts is to determine the reasonableness of police conduct and not drafting law enforcement policies.

Moreover, by holding that the regulations of the Florida Highway Patrol must mandate the opening of closed containers in order for a search of such a container to be lawful, the Florida Supreme Court has overlooked this Court's conclusion that:

> [R]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.

Bertine, 477 U.S. at 364, 107 S.Ct. at 742, 93 L.Ed.2d at 747. (Footnote omitted).

Dissatisfied with the specificity of Chapter 16 of the Florida Highway Patrol Policy Manual, the Florida Supreme Court has essentially offered its version of how the inventory procedures should be written. This exercise of judicial hindsight is precluded by *Bertine*.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

Respectfully submitted,

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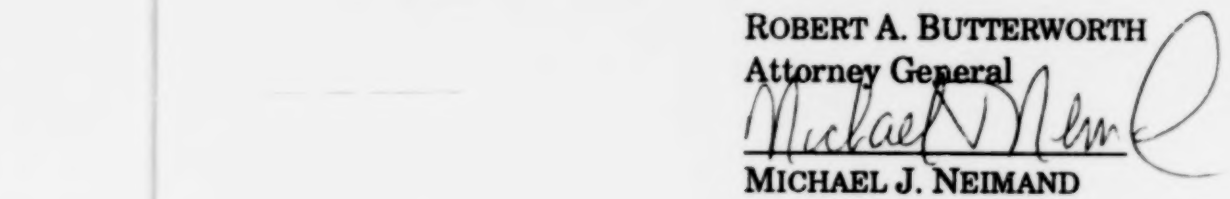

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Supreme Court of the United States

October Term, 1988

THE STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

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QUESTION PRESENTED (RESTATED)

WHETHER THE SEARCH OF A CLOSED CONTAINER FOUND DURING A VEHICLE INVENTORY SEARCH CONDUCTED ACCORDING TO AGENCY PROCEDURES WHICH DO NOT MANDATE OPENING CLOSED CONTAINERS IS CONSISTENT WITH THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES?

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STATEMENT OF THE CASE

A careful reading of the joint appendix reveals considerable detail concerning the circumstances of the automobile search. After observing the cash on the floorboard of the car driven by Mr. Wells, Trooper Adams recalled, "I . . . shined my light throughout the vehicle to see if there was anything else, as far as any other contraband other than the money." (JA. 204). Adams admitted, "My curiosity was aroused . . . ." (JA. 61).

Trooper Adams then radioed his supervisor to inquire about conducting an inventory search and the significance of the cash found in the car. (JA. 88, 207-208). The supervisor stated, "Anybody can have three thousand dollars on the floor of their car." (JA. 88). Adams proceeded to impound the vehicle, having been advised that the presence of the money was essentially irrelevant. (JA. 208).

K&S Automotive towed the vehicle driven by Mr. Wells to their fenced, guarded facility. (JA. 139 - 140). Trooper Adams arrived at K&S Automotive at approximately 1:30 a.m. to further inventory the car. (JA. 140). Adams sought the assistance of two K&S Automotive employees, Grover Bryan and William Kennedy. (JA. 141, 172). The three men began to search the vehicle, guided by Trooper Adams.

Mr. Bryan recalled, "Officer Adams said he wanted to inventory the car good, he wanted to go through it real good because he felt there was drugs in it." (JA. 141). A search of the car's passenger compartment revealed two marijuana cigarette butts in the ashtray. (JA. 141).

When asked about Trooper Adams' demeanor upon finding the contraband, Mr. Bryan noted, " . . . he kept saying there was more somewhere." (JA. 141). Adams then mentioned the cash previously found in the car and told Mr. Bryan, "There ain't nobody runs around with that kind of money in the floorboard unless they're dealings drugs or something like that." (JA. 142).

Having completed the search of the passenger compartment, Trooper Adams directed the search to the vehicle's trunk. (JA. 143). Tho only item found in the trunk was a locked suitcase. (JA. 144). Mr. Bryan commented on Trooper Adams' attitude upon finding the suitcase, " . . . he persisted we need to open that suitcase and find out what was in it." (JA. 144). Adams related that he had a strong suspicion there were drugs in the car and that they were probably contained in the suitcase. (JA. 145). Trooper Adams then directed that Bryan and Kennedy use their knives to pry open the suitcase. (JA. 146).

Responding to questions about a search warrant for the vehicle at this point, Trooper Adams replied, "Well, at this time I thought that would be appropriate – a search warrant would be appropriate, but based on what we had and it was part of the search – I figured it was part of the search, I didn't see where it need be." (JA. 82). When asked about the scope of an inventory search including prying open a locked suitcase with knives, Adams stated, "Well, I had to take my chances." (JA. 83).

William Kennedy and Grover Bryan pryed the case for about ten minutes before it opened. (JA. 147). The opened suitcase revealed a package wrapped in a plastic garbage bag. (JA. 147). Mr. Bryan noted Troopers Adams'

excited utterance, "There it is." (JA. 147). Trooper Adams then tore open the plastic covered package and discovered the marijuana. (JA. 97, 147 – 148, 177).

SUMMARY OF ARGUMENT

Under *Colorado v. Bertine*, 479 U.S. 367 (1987), a constitutional vehicle inventory search is conducted in good faith and not motivated by suspicion of criminal activity. The inventory search of the car driven by Mr. Wells escalated to an investigatory search seeking evidence of a drug deal. Since the inventory search served as a ruse to conduct an investigatory search, Trooper Adams' conduct violated Respondent's fourth amendment rights.

The Florida Highway Patrol's procedures are silent regarding closed containers found during inventory searches. The *South Dakota v. Opperman*, 428 U.S. 364 (1976), line of cases emphasize that to pass constitutional muster, inventories must be conducted according to standardized criteria. Since the Florida Highway Patrol's procedures fail to mention closed containers, no standard criteria exists. Thus, the inventory search which included prying open a locked suitcase violated the fourth amendment teachings of *Opperman* and its progeny.

Vehicle inventory searches are a valid exception to the warrant requirement if conducted to protect owner's property, to protect the police from spurious claims of lost property, and to guard against hidden dangers. *Bertine* reiterates that vehicle inventory searches must adhere to standardized criteria.

Vehicle inventory searches are reasonable if their scope is that minimum level of intrusion necessary to satisfy the *Opperman* justifications. Further, such searches must not be motivated by criminal suspicion.

The scope of the inventory search conducted by Trooper Adams was unreasonable. The scope exceeded the level of intrusion necessary to satisfy the *Opperman* justifications. Breaching a locked container is inconsistent with the notion of protecting an owner's property. Returning unlocked or broken containers to property owners will only aggravate the problem with spurious claims of lost or stolen property. The joint appendix contains no testimony that Adams pryed open the container for safety concerns. In fact, the very act of prying open the container evinces a lack of concern of hidden dangers.

Adams should have inventoried the suitcase as "one locked container used to carry personal effects". The property within the locked case could have been securely stored in the vehicle's trunk within the fenced, guarded facility where the inventory occurred. Further, preserving the integrity of the locked suitcase would minimize claims of lost or stolen property.

Exigencies of law enforcement require that police have discretion when performing their duties to protect themselves and the public. For vehicle inventory searches, discretion must be narrowly tailored to effectively proscribe intrusions founded upon investigatory motives. The exercise of discretion may not exceed the bounds of the *Opperman* justifications. Adams' search of the suitcase may only be characterized as unreasonable

since the intrusion exceeded the scope allowed by *Opperman*. The heightened expectation of privacy in personal luggage supports this conclusion.

The general guidelines of the Florida Highway Patrol vest searching officers with an unconstitutional quantum of discretion. Trooper Adams was free to open some containers and not others. This is precisely the sort of arbitrary intrusion the fourth amendment guards against.

The Supreme Court of Florida properly held that inventory procedures must address closed containers and be reasonable. In the absence of a procedure or standardized criteria required by *Bertine*, the search of the vehicle driven by Mr. Wells was unreasonable.

In the instant case the inventory search escalated to an investigatory search based on criminal suspicion. Petitioner concedes that Adams had probable cause to search the locked suitcase. Petitioner admits that Adams felt the case contained either weapons or money from a drug deal.

The Florida Highway Patrol had exclusive control of the suitcase and in the absence of any exigency, the fourth amendment principles of *U.S. v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), require a warrant to search the container. Since no threat of losing evidence existed and the joint appendix reveals that the case posed no danger to Adams or the search party, the authority to search the locked suitcase may only come from a detached, neutral magistrate.

INTRODUCTION

The fourth amendment permits warrantless vehicle searches in a few, carefully defined circumstances. Impending danger, or the threat of losing evidence are the type of exigencies which permit warrantless searches. Further, administrative procedures such as inventory searches conducted according to standard criteria are consistent with the fourth amendment. However, in the absence of an exigency, the automobile exception to the warrant requirement evaporates.

Petitioner urges that the scope of a vehicle inventory search is properly determined by the searching officer trying to satisfy government interests. The argument makes the inventory search itself an exigency, justifying a warrantless vehicle search to satisfy the *Opperman* justifications. In the instant case, Petitioner claims that Trooper Adams had to pry open the locked suitcase to ensure he satisfied government needs.

Absent exigent circumstances, once the police have exclusive control of the property to be searched, a warrant is required. However, Petitioner's argument permits law enforcement officers to determine the scope of an inventory search based on the need to protect property, prevent false claims, and to protect himself. If an officer feels that a locked suitcase must be pryed open to satisfy *Opperman*, Petitioner asserts that such action is consistent with fourth amendment principles.

By treating the *Opperman* justifications as exigencies which permit warrantless searches of locked suitcases, Petitioner's position greatly undermines the fourth amendment protection of one's vehicle and its contents.

As long as the search is labeled an "inventory", officers may search vehicles and their contents in a fashion for which the fourth amendment traditionally requires a warrant. All impounded vehicles may be subjected to complete, detailed searches without probable cause.

Sustaining Petitioner's contentions effectively nullifies the fourth amendment principles of *Chadwick* and *Sanders*. Under the *Opperman* "exigencies", even after the property to be searched is in the exclusive control of the police, locked suitcases found in vehicles may be searched without a warrant.

In reviewing the record and briefs before this Court, Respondent would stress that what occurred in this case involved nothing more than a pretext search. By pretext search Respondent includes "searches or seizures that are undertaken by law enforcement officers for reasons that do not constitute a proper legal justification for such activity." See Burkoff, *Bad Faith Searches*, 47 N.Y.U. L. Rev. 70, 71 N.5 (1982) quoted in Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. Det. L. Rev. 363, 364 (1989). To date this Court has recognized that the fourth amendment has been compromised, as in this case, when two elements coalesce: first, when it is found to be clear that the government seized evidence on the basis of pretext even though the government's agents could have acted lawfully, and second, when an improper motivation is discovered. From this perspective, the obvious case for concern for Petitioner is *Colorado v. Bertine, supra*. In *Bertine* as Respondent will develop *infra*, this court reaffirmed the appropriateness of an in-depth factual case-by-case analysis in order to determine pretext. In fact in *Bertine* this Court after finding the inventory search of

Bertine's van and its contents constitutional, stressed the fact that there was no evidence on the record of pretext and hence any linkage of pretext with inventory searches generally was disavowed. "In the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." 479 U.S. 367, 372 (1987) (citations omitted). This critical point has been ignored by Petitioner in its search for a bridge to connect its pretext search with an inventory search. Petitioner's failure to bridge the acceptable with the unconstitutional results in *Bertine* being distinguished from the present case and places the present case within the same posture as *Missouri v. Blair*, 474 U.S. 1049 (1986) *cert.* dismissed 480 U.S. 689 (1987).

The first of Petitioner's bridges too far is this Court's ruling in *Bertine* that suspicionless inventory searches of the contents of vehicles are constitutional when explicitly conditioned upon the finding that there was *no* evidence that the police officers were *not* making precisely what the search purported to be, namely, an inventory (not an investigative) search. Following *Bertine*, a defendant could demonstrate that a search was not in fact an inventory, *i.e.*, that it was pretextual, by making a showing that the police failed to follow "standardized procedures" or "acted in bad faith or for the sole purpose of investigation." *Id.* It is important to note that standardized procedures were not followed in the present case any more than were followed in *Blair*.

The second bridge too far for Petitioner is *Maryland v. Garrison*, 480 U.S. 79 (1987) wherein this Court held the

search and seizure constitutional because, although mistaken about whose premises they were searching, the executing officers:

> [P]erceived McWebb's apartment and the third floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor . . . [since] the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment. *Id.* at 88-89 (citations omitted).

The reasonableness of the executing officers' mistake about the apartment they were in was critical to the holding. The Court emphasized that the officers' belief that they were in McWebb's apartment was a reasonable one given the physical configuration of the floor:

> [T]he validity of the search of [Garrison's] apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises. *Id.*

In essence, the rule that this Court has adopted to govern when mistaken searches are constitutional has been ignored by Petitioner and that is: has there been a reasonable and honest good faith effort on the part of the officer. Without that bridge the officer has gone too far. Such is the posture of the present case.

ARGUMENT

I. WHEN A LAW ENFORCEMENT AGENCY MAINTAINS PROCEDURES TO INVENTORY THE CONTENTS OF IMPOUNDED VEHICLES AND THOSE PROCEDURES DO NOT MANDATE OPENING CLOSED CONTAINERS, AN INVENTORY SEARCH OF SUCH A CLOSED CONTAINER VIOLATES THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES.

A. THE SCOPE OF A VEHICLE INVENTORY SEARCH WILL CONSTITUTIONALLY INCLUDE OPENING CLOSED CONTAINERS IF REASONABLE LAW ENFORCEMENT AGENCY PROCEDURES REQUIRE SUCH ACTION IN EACH CASE.

In 1985, Trooper Rodney Adams of the Florida Highway Patrol arrested Respondent, Martin Leslie Wells, for driving under the influence of alcohol. (JA. 281). At the time of the arrest, Trooper Adams discovered a substantial amount of currency in the car driven by Respondent. (JA. 59-60). Adams consulted his supervisor and then impounded the vehicle. (JA. 88, 208). Later that evening, Trooper Adams inventoried the impounded car, which included prying open a locked suitcase found in the trunk. (JA. 282).

Petitioner argues that *Colorado v. Bertine*, 479 U.S. 367 permits the exercise of police discretion for inventory searches unless the searching officer is suspicious of criminal activity and uses his discretion to search for evidence. *Id.*, 479 U.S. at 375. Petitioner cites *Bertine*, as the Court discusses the constitutionality of the decision to impound the vehicle:

> Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder Police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity. *Bertine*, 479 U.S. at 375, 107 S.Ct. at 743, 93 L.Ed. 2d at 748 (Footnote omitted).

The Florida Highway Patrol's *Forms and Procedures Manual* fails to address how to handle closed containers found during an inventory search. (JA. 288-294). No standard criteria exits.[1] *Id*. When Trooper Adams pryed open the locked suitcase, he used his discretion to determine the scope of the search. Thus, whether Adams' conduct comports with the fourth amendment depends, in part, on his motive. *Bertine*, 479 U.S. at 375.

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[1] *See Johnson v. State*, 764 P.2d 530 (Okl.Cr.1988), as the court notes with approval the standard criteria:

> 3. All areas of the vehicle must be inventoried, glove compartment, luggage compartment, etc., provided entry can be gained without forcing locks.
>
> 4. Items of personal property inside the vehicle that are locked separately, such as luggage, tool boxes, etc., shall not be entered without proper authority. *Id*. at 534.

(Continued on following page)

(Footnote omitted). Under the rationale of *Bertine*, Adams must have searched the car in good faith, not seeking to discover evidence of a crime to satisfy the fourth amendment. *Id.*

The joint appendix contains useful testimony to evaluate Trooper Adams' motivation to pry open the case in the absence of agency guidelines. Grover Bryan, who assisted Adams in the search, recalled that before the search began, Trooper Adams was suspicious and felt they would find drugs in the car. (JA. 141). Once the search uncovered the marijuana cigarette butts, Trooper Adams told Mr. Bryan about the currency found earlier and declared, "There ain't nobody runs around with that kind of money in the floorboard unless they're dealing drugs or something like that." (JA. 142). When the search party found the locked suitcase, Trooper Adams reiterated his feeling that drugs would be found, suggesting they were probably in the case. (JA. 145).

As the search began, Trooper Adams stated that he was suspicious of criminal activity. (JA. 141) During the

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See Commonwealth v. Martinson, 533 A.2d 750 (Pa.Super.1987), *appeal docketed*, No. 123 E.D. (Pa. Sept. 7, 1988), noting the Philadelphia Police Department's standard criteria:

> (1) Remove all personal property from the vehicle and place it in a police vehicle for safekeeping.
>
> (a) The officer will not force a lock off the compartment or trunk, but will note on the Property Receipt that either or both were locked. *Id.* at 753.

search, the rookie officer became excited and his statements unequivocally evince suspicion of a drug related crime. (JA. 141, 142, 145, 147). The scope of the search progressed in accord with Trooper Adams' motive to investigate. The purported "inventory search" escalated to a warrantless intrusion unreasonably rifling a locked container typically used to secure personal effects.

Assuming, *arguendo*, that the Florida Highway Patrol's inventory search procedures are a sufficient standardized criteria to constitutionally guide officers, Trooper Adams' exercise of discretion violates the fourth amendment under the rationale of *Bertine*. 479 U.S. at 375. Adams searched the vehicle without a warrant seeking to discover evidence of a crime. *Id.* Trooper Adams thus acted in bad faith violating the principles of *Opperman* and its progeny.

In *Colorado v. Bertine*, this Court held that, "reasonable police regulations relating to inventory procedures administered in good faith satisfy the fourth amendment, even though courts might, as a matter of hindsight, be able to devise equally reasonable rules requiring a different procedure." *Id.* 479 U.S. at 374. The holding is appended by footnote 6, citing *Illinois v. Lafayette*, 462 U.S. 640 (1983), and *South Dakota v. Opperman*, 428 U.S. 364, stating:

> We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria. *Id.* 479 U.S. at 374, 107 S.Ct. at 742, 93 L.Ed.2d at 747.

Bertine requires that inventory searches be reasonable, be in accord with a standardized criteria and be administered in good faith. *Id.* The Supreme Court of Florida interprets "standardized criteria" to require inventory procedures which mandate either opening all containers or none of them.[2] (JA. 256). Petitioner asserts that this view is, "an overly-restrictive misapplication of the law to the facts." (Petitioner's *BRIEF ON THE MERITS*, hereinafter 'Brief', at 11).

Bertine mandates that inventory procedures vest searching officers with limited discretion to ensure inventory searches are consistent with fourth amendment principles concerning warrantless searches. *Bertine*, 479 U.S. at 375. Warrantless searches are justified by the presence of exigent circumstances or standardized criteria to ensure fourth amendment principles are respected. *Terry v. Ohio*, 392 U.S. 1, at 22 (1968). *Delaware v. Prouse*, 440 U.S. 648, at 654-655 (1979). *Cady v. Dombrowski*, 413 U.S. 433, at 443 (1973). *Carroll v. U.S.*, 267 U.S. 132 (1925). *South Dakota v. Opperman*, 428 U.S. 364. *Bertine* precludes the exercise of police discretion based upon criminal suspicion during vehicle inventory searches. *Bertine*, 479 U.S. at 375. The evidentiary discretion denounced in *Bertine* relates to the decision to impound a vehicle and the procedures prescribing the scope of an inventory search. *Id.* 479 U.S. at 374-376.

Florida Highway Patrol's procedures required that all impounded vehicles be subject to an inventory search.

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[2] At least one other state court reads *Bertine* this way, *State v. Shamblin*, 763 P.2d 425 (Utah App. 1988).

(JA. 288). Petitioner asserts that alone, this instruction is sufficient to proscribe the evidentiary discretion denounced in *Bertine*. (Brief at 11-12). The procedures reveal nothing concerning the scope of an inventory search or in what fashion one is to be conducted. *Id.* The only guidance afforded officers is found in section 16.02.00 'Instructions for Completing the Inventory and Vehicle Storage Receipt.' (JA. 289-291). Instruction number 18 states:

> 18. List Property in Vehicle-Inventory of all articles in the vehicle should be shown such as articles of clothing, equipment, and tools. (JA. 290).

Petitioner submits that the instruction noted above is a sufficient standardized criteria to constitutionally permit prying open a locked suitcase during an automobile inventory search. (Brief at 12).

Bertine requires that a standardized criteria exists to guide inventories, and that this criteria be adhered to. *Bertine*, 479 U.S. at 375. For Adams' conduct to pass constitutional muster, he must have followed the Florida Highway Patrol's procedures. *Id.* Chapter 16 of the manual provides that searching officers must complete several property receipt forms to ensure the *Opperman* interests are satisfied. (JA. 288-294). However, the record in the instant case contains no evidence that Adams completed the required forms. Adams thus failed to satisfy the Florida Highway Patrol's standard procedures for vehicle inventory searches.

The Florida Highway Patrol's procedures lack the requisite specificity to constitutionally permit opening closed containers. No policy exists to guide the searching officer regarding closed containers. Inventories must adhere to standard criteria to preclude arbitrary encroachment upon fourth amendment rights. *Bertine*, 479 U.S. at 374-375. Curious about the currency and marijuana remnants in the ashtray, Adams elected to pry open the suitcase seeking evidence of a drug deal. (JA. 141, 142, 145). Since agency guidelines ignored closed containers, Trooper Adams was free to open some containers and not others.[3] Such an exercise of discretion contravenes the fourth amendment principles of *Bertine*. *Bertine*, 479 U.S. at 375. Under the *Opperman* line of cases, inventory procedures must articulate standards to guide officers in a constitutionally permissible fashion. *Opperman*, 428 U.S. at 372. *Lafayette*, 462 U.S. at 648. This Court has long recognized the need for standard procedures to guide police conducting searches emphasizing the, " . . .- limited time and expertise to reflect on and balance the social and individual interests involved." *New York v. Belton*, 453 U.S. 454 at 458 (1981).

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[3] In *State v. Shamblin*, the Court of Appeals of Utah noted that such discretion is inconsistent with the teachings of *Bertine*. *Id.* at 428.

B. THE SCOPE OF A CONSTITUTIONAL INVENTORY SEARCH IS BASED ON ARTICULATED, SPECIFIC PROCEDURES TO ENSURE THE SEARCHING OFFICER SEARCHES EACH CAR IN THE SAME, MINIMALLY INTRUSIVE FASHION NECESSARY TO SATISFY THE *OPPERMAN* JUSTIFICATIONS.

In *South Dakota v. Opperman*, 428 U.S. 364, this Court first recognized vehicle inventory searches as a valid exception to the warrant requirement. *Opperman* permits law enforcement agencies to inventory the contents of impounded vehicles if conducted according to standard police procedures. *Opperman*, 428 U.S. at 372. The Court articulated three situations where government interests outweighed an individual's fourth amendment rights: protecting the owner's property in police custody, protecting the police against claims of lost or stolen property, and protecting the police from danger. *Id.* 428 U.S. at 369.

Colorado v. Bertine further defined the requirements of a constitutional inventory search. The Court held that reasonable police procedures for automobile inventory searches administered in good faith satisfied constitutional standards. *Bertine*, 479 U.S. at 374. The Court emphasized that inventories must be conducted according to standardized criteria. *Id.* n.6. As an example of a standardized criteria, the Court noted that Boulder Police procedures mandated opening all closed containers found during automobile inventory searches. *Id.*

Petitioner asserts that inventory searches are reasonable under the fourth amendment if agency guidelines satisfy the *Opperman* justifications. (Brief at 13). Petitioner claims that inventory searches are only unreasonable if

used as a ruse to conduct an investigatory search. *Id.* Petitioner urges that the constitutionality or reasonableness of an inventory search must be an ad hoc determination based on an objective standard. *Id.* The argument concludes that without the discretion to determine the scope of an inventory search, officers cannot ensure the search will be reasonable. *Id.*

This Court has long noted the basic purpose of the fourth amendment is, "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, at 528 (1967). Quoting *Camara*, the Court reiterated the need to impose a standard of reasonableness to control the exercise of discretion by law enforcement agents. *Delaware v. Prouse*, 440 U.S. 648, at 654 (1979). The reasonableness of a particular police procedure is determined by balancing its intrusion on an individual's fourth amendment rights versus the importance of government interests advanced by the procedure.[4] *Id.*

Citing *Delaware v. Prouse*, Petitioner notes that, " . . . the reasonableness standard usually requires at a minimum, that the facts upon which an intrusion is based be capable of measurement against an objective standard . . . " (Brief at 14). In *Prouse*, the Court noted that probable cause provided such a standard against which police conduct may be assessed. 440 U.S. at 654. Since the *Opperman* justifications focus on the government interests

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[4] *See State v. Flittie*, 425 N.W. 2d 1 (S.D. 1988), as the Supreme Court of South Dakota discusses the reasonableness requirement under *Opperman* and its progeny.

served by inventory searches, the *Opperman* interests provide a suitable objective standard to assess the constitutionality of an inventory search. Under the *Opperman* line of cases, the constitutional boundary for the scope of vehicle inventory search is that level of intrusion necessary to protect personalty within the vehicle, to protect the police from spurious claims, and to ensure police safety.

Petitioner insists that police may constitutionally breach the security of a locked suitcase to protect its contents. Thus, police may actually damage personal property to satisfy the *Opperman* justifications. If police feel that a suitcase contains valuables or weapons, Petitioner contends that *Opperman* permits opening the case, even if it is locked.

Permitting police to breach locked suitcases is the antithesis of protecting an owner's property. Prying open a locked suitcase may render the case useless as a repository for personal effects. Owners of locked suitcases which are returned unlocked or with broken latch mechanisms will be suspicious. A natural response by such property owners will be to carefully inspect the contents of the broken container to ensure nothing is missing. Since law enforcement agencies have problems with spurious claims of lost property, some property owners are predisposed to make false claims. Assuming the problem is genuine, those predisposed to levy false claims will be joined by a legitimately suspicious group of property owners with breached containers.

In *Cooper v. California*, 386 U.S. 58 (1967), this Court held that police may search a vehicle for their own protection if the vehicle must be retained by police. *Id.* 386 U.S. at 61-62. In *Opperman*, the Court adopted this reasoning as a component of the inventory search rationale. *Opperman*, 428 U.S. at 369. The joint appendix fails to reveal evidence that Trooper Adams justifiedly pryed open the suitcase to protect himself. The decision to pry open the case was premised on the belief that it posed no latent danger. Adams characterized Respondent as cooperative and friendly. (JA. 35). The appendix contains no indicia that Adams pryed open the case for safety reasons. In fact, Adams' only apparent motive to open the locked case was to search for evidence of a crime. (JA. 141, 142, 145).

Trooper Adams conducted an unreasonable inventory search on the vehicle since the scope of the search extended beyond that allowed by the *Opperman* justifications. If Trooper Adams merely inventoried the suitcase as "one locked container used to carry personal effects", the *Opperman* needs are satisfied. Adams could have left the locked suitcase within the vehicle's trunk at K&S Automotive's locked, guarded facility. Property within the case is secure and preserving the integrity of a locked suitcase will serve to minimize claims of lost or stolen property. Nothing in the joint appendix suggests that Respondent or the suitcase posed any threat to Trooper Adams. Thus, the fourth amendment will not sustain prying open a locked suitcase based on an undifferentiated or putative concern for safety. Such an arbitrary invasion is precisely the type of conduct the fourth amendment guards against. *Camara*, 387 U.S. at 528.

Ultimately, Petitioner argues that law enforcement officers must have the discretion to determine the scope of an automobile inventory search to ensure the intrusion is constitutionally reasonable. (Brief at 14-15). Noting the variety of vehicles and property which police encounter under impoundment procedures, Petitioner urges, "The objective facts, as seen by the officer, must determine to a degree the scope of the search regardless of the specificity of the policy." (Brief at 15). The argument concludes, " . . . if in the light of the facts, a caretaking function has been performed, such as protecting the property, protecting the safety of the police or the public, or preventing claims, an inventory search should be upheld . . . " *Id.*

Opperman and its progeny permit the exercise of police discretion according to standard criteria if based on something other than suspicion of criminal activity. *Opperman* reiterated that standard procedures will ensure that the intrusion would be limited in scope to the extent necessary to satisfy the caretaking functions of inventory searches. *Opperman*, 428 U.S. at 374-375. The exigencies of the real world require that police be permitted to exercise their discretion to protect themselves and the public.

The exercise of discretion in conducting inventory searches must be reasonable. The intrusion is constitutional if it is the minimum necessary to satisfy the *Opperman* justifications. An individual's legitimate expectation of privacy may not be trampled by the unbridled exercise of discretion under the guise of inventory procedures.

Traditionally, this Court has drawn a distinction between automobiles and homes under the fourth amendment. *Opperman*, 428 U.S. 367. The Court noted in

Opperman that the expectation of privacy regarding one's automobile is significantly less than that relating to one's home. *Id.*

In *United States v. Chadwick*, 433 U.S. 1, the Court emphasized that a person's expectation of privacy in personal luggage is substantially greater than in an automobile. *Id.* 433 U.S. at 13. In *Arkansas v. Sanders*, 442 U.S. 753, the Court re-emphasized that an individual's expectation of privacy in luggage, a repository for personal effects, is not diminished merely because it is carried in an automobile. *Id.* 442 U.S. at 764.

Absent agency guidelines concerning closed containers, Trooper Adams' exercise of discretion to determine the scope of the inventory search exceeded constitutional bounds. The heightened expectation of privacy in personal luggage supports this conclusion. The fourth amendment does not countenance a warrantless intrusion of a locked container typically used to secure personal effects. The exercise of discretion under *Opperman* and its progeny must be constrained to ensure the search is limited to the extent necessary to satisfy government interests. Further, such discretion may not be exercised based on suspicion of evidence of criminal activity. *Bertine*, 479 U.S. at 375. Under *Bertine*, an inventory search used as a ruse to conduct an investigatory search constitutes bad faith and is unreasonable under the fourth amendment. *Id.* 479 U.S. at 374-376.

The Florida Highway Patrol's procedures vested officers conducting vehicle inventory searches with an unconstitutional quantum of discretion. In *Camara v. Municipal Court*, the Court emphasized that warrantless

searches are unreasonable except in certain carefully defined classes of cases. *Camara*, 387 U.S. at 528-529. Acting under the very general guidelines of the Florida Highway Patrol, Trooper Adams was free to open some containers and not others.[5] The scope of vehicle inventory searches should be the same in each case. The justification for allowing warrantless searches is that the presence of exigent circumstances or standardized criteria ensures one's fourth amendment rights are preserved. *Terry v. Ohio*, 392 U.S. 1, at 22. *Delaware v. Prouse*, 440 U.S. 648, at 654-655. *Cady v. Dombrowski*, 413 U.S. 433, at 443. *Carroll v. U.S.*, 267 U.S. 132. *South Dakota v. Opperman*, 428 U.S. 364.

The Court explained in *Johnson v. United States*, 333 U.S. 10 (1948), "When the right of privacy must reasonably yield to the right of search is, as a rule to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* 333 U.S. at 14. Thus, the right to conduct inventory searches without the review of a detached, neutral magistrate, must be guided by clearly defined procedures. *Bertine*, 479 U.S. at 374. Searching officers must search each car in the same minimally intrusive fashion to preserve fourth amendment rights.

In *South Dakota v. Opperman* and *Colorado v. Bertine*, this Court outlined the government interests which justify automobile inventory searches. The reasonableness of an inventory search is based on balancing the level of intrusion versus the government interests advanced by the search. *Prouse*, 440 U.S. at 654. These interests form

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[5] *See supra* note 3.

the objective standard Petitioner urges the Court to follow. Since the scope of the search conducted by Trooper Adams surpassed the level of intrusion necessary to protect owners' property, to minimize false claims of lost or stolen property, and to protect police, the search was unreasonable. The fourth amendment will not sanction such an intrusion.

The joint appendix reveals that Trooper Adams conducted the inventory search seeking to discover evidence of a drug related crime. (JA. 141, 142, 145, 147). Following *Bertine's* reasoning, since Adams searched the automobile as a ruse to conduct an investigatory search, he acted unreasonably and thus violated Respondent's fourth amendment rights. *Bertine*, 479 U.S. at 374-376. Trooper Adams' actions evince bad faith and violate one of the fundamental tenets of vehicle inventory searches articulated in *Colorado v. Bertine*. *Id*. 479 U.S. at 374.

The Supreme Court of Florida correctly held that procedures for vehicle inventory searches may not be so general to permit inventory searches of different cars differently. The level of intrusion of inventory searches must be the same for all vehicles to satisfy fourth amendment principles. Vehicle inventory searches, as for all warrantless searches, must adhere to standardized criteria, proscribing a scope beyond that required to satisfy the government interests advanced by the search. *Prouse*, 440 U.S. at 654.

The principle of federalism ensures the states' right to experiment in matters of local concern.[6] *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). Constitutional issues concerning the local exercise of police power and thus inventory procedures are included within this realm. The state supreme court properly reviewed the reasonableness of the Florida Highway Patrol's procedures implemented by Trooper Adams concerning vehicle inventory searches. Thus, the decision of the Supreme Court of Florida concerning the constitutionality of a vehicle inventory search should be affirmed.

C. THE SUPREME COURT OF FLORIDA PROPERLY HELD THAT INVENTORY SEARCH PROCEDURES MUST ADDRESS CLOSED CONTAINERS AND BE REASONABLE TO SATISFY THE FOURTH AMENDMENT PRINCIPLES OF *COLORADO V. BERTINE*.

As noted, the Florida Highway Patrol's manual lacks rules regarding closed containers found during inventory searches and guidelines for the scope of such a search. (JA. 288-294). After finding money and two marijuana cigarette butts, Trooper Adams chose to pry open a locked suitcase seeking evidence of a drug deal. (Brief at

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[6] For a survey of the states' diverse approaches when reviewing inventory searches and the opening of closed containers, *see State v. Knippers*, 535 So. 2d 403 (La.App. 3 Cir. 1988); *State v. Hall*, 745 S.W.2d 745 (Mo.App. 1987); *Jones v. State*, 370 S.E.2d 784 (Ga.App. 1988); *People v. Blasich*, 527 N.Y.S.2d 563 (A.D. 2 Dept. 1988); *Commonwealth v. Bishop*, 523 N.E.2d 779 (Mass. 1988).

8). Thus, the central issue is whether a law enforcement agent may constitutionally investigate by prying open a locked suitcase, absent agency guidelines, during a vehicle inventory search.

The Supreme Court of Florida properly answered the question in the negative guided by *Opperman* and *Bertine*. The Supreme Court of Florida accepted discretionary review of the instant case to assess the reasonableness of an inventory search conducted by a state law enforcement agent.

Petitioner argues that the Supreme Court of Florida is drafting local law enforcement policies and procedures. The holding in *State v. Wells*, 539 So.2d 464 (Fla. 1989), requires that some procedures exist concerning closed containers. *Id.* at 469. Under *Bertine*, inventory searches must be reasonable and be conducted according to standardized criteria. The Supreme Court of Florida reviewed police conduct in the absence of procedure. Once the Florida Highway Patrol drafts a procedure concerning closed containers, the Supreme Court of Florida may have the opportunity to review implementation on an ad hoc basis.

Petitioner strenuously urges that the Supreme Court of Florida's dictum which mandates that inventory searches adhere to a no discretion policy for closed containers is contrary to *Bertine*. (Brief at 17). Petitioner premised the argument on this Court's conclusion:

> [R]easonable police regulations relating to inventory procedures administered in good faith satisfy the fourth amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure. *Bertine*, 479 U.S. at 374, 107 S.Ct. at 742, 93 L.Ed.2d at 747. (Footnote omitted).

However, in the instant case, Trooper Adams searched the suitcase in the absence of agency guidelines. The Supreme Court of Florida reviewed police conduct against this Court's principles concerning vehicle inventory searches and concluded that a no discretion policy for closed containers is required.

The Supreme Court of Florida's holding is consistent with the policy of judicial deference to local law enforcement procedures suggested by *Bertine*. The essence of the holding is that closed containers may not be opened during inventory searches without agency guidelines. The Constitution requires that standardized criteria guide inventory searches, and the Supreme Court of Florida interprets this to mean "no discretion."

D. WHEN A VEHICLE INVENTORY SEARCH UNCOVERS PROBABLE CAUSE OF A CRIME, THE FOURTH AMENDMENT PRINCIPLES OF *UNITED STATES V. CHADWICK* AND *ARKANSAS V. SANDERS* PRECLUDE A WARRANTLESS INTRUSION OF LOCKED PERSONAL LUGGAGE SUSPECTED OF CONTAINING CONTRABAND.

Petitioner concludes the SUMMARY OF ARGUMENT by stating, "The objective facts present, the cash on the floor of the car and the marijuana cigarette butts in the ashtray, definitely lead to the reasonable conclusion that, as a result of a drug deal, either money or weapons were located in the suitcase." (Brief at 8). Thus, Petitioner

concedes the existence of probable cause to search the locked suitcase. Petitioner admits that Trooper Adams felt contraband from a drug deal would be found in the locked container. *Id.*

In *United States v. Chadwick*, 433 U.S. 1, this Court reviewed the question whether a search warrant is required before police may open a locked footlocker seized at the time of a suspect's arrest when there is probable cause to believe the footlocker contains contraband. *Id.* at 3. The Court held that in the absence of an exigency to support an immediate search, the Warrant Clause requires the review of a detached, neutral magistrate once the property to be searched is under the exclusive control of the police. *Id.* at 15. The Court emphasized that the expectations of privacy in personal luggage are substantially greater than in an automobile. *Id.* at 13.

The facts of the instant case are, from the perspective of reviewing the search conducted, apposite to the teachings of *Chadwick*. In *Chadwick*, police arrested respondents and assumed exclusive control of the footlocker suspected of containing contraband. *Id.* at 4. Having secured the container, and absent fear that it posed any threat to the agents, the Court held that probable cause alone would not sustain the warrantless search. *Id.* at 15. Citing *Johnson v. United States*, the Court stated,

> " . . . a judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 9. (Citations omitted)

In the case at bar, Trooper Adams conducted the inventory search after the vehicle driven by Respondent

was impounded. From the instant Adams decided to impound the vehicle, the Florida Highway Patrol assumed dominion over the vehicle and its contents. No threat existed that Mr. Wells' would remove the contents of the suitcase. Adams offered no testimony suggesting the suitcase posed any danger to the search party. The fact that Adams directed that the case be pryed open suggests a lack of concern for latent danger. Thus, under the fourth amendment principles of *Chadwick*, without an exigency requiring an immediate search, and since Adams had probable cause to believe the suitcase contained contraband, a search warrant was required. When Adams had the suitcase pryed open, he violated Respondent's fourth amendment rights.

This Court's decision in *Arkansas v. Sanders* supports the conclusion that Trooper Adams unreasonably encroached upon protections afforded Respondent by the fourth amendment. In *Sanders*, the Court reviewed the question whether, in the absence of exigency, police must obtain a search warrant to search luggage taken from an automobile properly stopped and searched for contraband. *Sanders*, 442 U.S. 745. The Court held that once police detain a criminal suspect and secure his suitcase, judicial approval is required before the case is searched. *Id.* at 766. Unless delaying the search will endanger the police or cause a risk of losing evidence, the Court reasoned that prior judicial approval is required to preserve a suspect's constitutional rights. *Id.*

During the inventory search of the vehicle driven by Mr. Wells, Adams discovered what he felt was evidence of a drug deal. (Brief at 8). Adams' motive to investigate supplanted the customary caretaking functions of inventory searches. Adams intimated that the suitcase contained contraband from a drug deal. (JA. 141, 142, 145).

There being no indicia that delaying the search to seek judicial approval would create a risk of losing evidence or endangering Adams and his cohorts, the search of the suitcase violated Mr. Wells' constitutional rights. Under *Chadwick* and *Sanders*, a warrant is required to search a suitcase suspected of containing contraband in the absence of an exigency.[7]

CONCLUSION

For the reasons stated, the decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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[7] *See State v. Ailport*, 413 N.W.2d 140 (Minn.App. 1987), where an officer who conducted an inventory search and had probable cause to believe a locked bank bag contained contraband obtained a search warrant before opening the locked container.